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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,

Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR
LOUISIANA POWER & LIGHT COMPANY

I. QUESTIONS PRESENTED[1]

1. Whether a United States District Court has jurisdiction of a suit for an injunction to prohibit the breach of two contracts involving direct sales of natural gas to an industrial customer for its ultimate consumption.

2. Whether a United States District Court has jurisdiction of a suit for injunction to prohibit breach of a contract for the sale intrastate of gas delivered through an intrastate pipeline facility.

II. STATEMENT OF THE CASE

This litigation involves a designed program by Pennzoil-United, Inc., to be conducted by its wholly-owned subsidiary, United Gas Pipe Line Company ("United"), using the Federal Power Commission ("FPC") as its vehicle, having as its overall purpose the obtaining of increased revenues for its product, natural gas. That program has three visible prongs—

(a) The use of temporarily declining gas reserves to create a "shortage" of natural gas, thus providing a pretense of need for "curtailments", laying the groundwork for United's "Curtailment Proceeding," a petition for declaratory order that would permit United to curtail gas deliveries to *all* of its customers. (Appendix Q to this Brief)

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[1] The FPC has prescribed an unacceptable Question No. 1 in that the term "direct corporate users" is meaningless. It matters not whether the user is a corporation, individual, or governmental body; what matters under the Natural Gas Act is whether the direct sale is for resale or consumption. More important, Question No. 1 assumes that this Court is reviewing the various issues in FPC's Curtailment Proceeding when, in fact, this is an injunctive suit alleging breaches of direct gas sales contracts to an industrial consumer.

(b) Contemporaneously with the "Curtailment Proceeding", United filed another petition with FPC, for a certificate of convenience and necessity "authorizing" it to "continue to operate certain pipeline facilities" in South Louisiana that it had been operating for many years. (U. App. 91a)[2]

(c) United's third filing with FPC was for a rate increase that would involve even the customers on the pipeline for which United was then requesting a certificate. (FPC Docket No. RP71-41)

The Curtailment Proceeding was designed to achieve increased revenues by several separate approaches described more fully hereinafter, not the least of which was to allocate its gas in such manner that its existing customers (with low prices) would receive less gas so that United could furnish some of that gas to new customers (at higher prices).[3] The Certificate Proceeding was designed to get United out from under the jurisdiction of the Louisiana Public Service Commission because it could receive more favorable rate treatment with respect to those customers from the FPC. In the words of United's General Attorney: (RP71-29 Transcript Vol. 18, p. 1966)

"Yes, and to come under the jurisdiction of the

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[2] "P. App." refers to FPC's Appendix; "R. App." refers to LP&L's Appendix; "U. App." refers to United's Appendix; and "A" refers to the separate Appendix.

[3] Commissioner Carver succinctly described United's activities in his Opinion 610 dissent (at U. App. 128a):

". . .[T]he present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands."

> Louisiana Public Service Commission, by virtue of which event, the rates would have been lower to these city gate customers because the Louisiana Public Service Commission is a little more rigorous, considerably more rigorous in its regulatory attitude than the Federal Power Commission."[4]

United's whole scheme might have gone forward to completion without hindrance except that Louisiana Power & Light Company ("LP&L") had two contracts with United for direct sales of gas to LP&L for use in its Sterlington and Nine-Mile Point Generating Stations in Ouachita and Jefferson Parishes, Louisiana, respectively, which contracts contained more favorable "Impairment of Delivery" clauses than United's "curtailment program" offered. LP&L requested United to honor its contracts and deliver the gas it had contracted to deliver. United refused. LP&L filed this suit to enforce its contracts. And this maelstrom developed.

A. The Curtailment Proceeding

United filed a petition for declaratory order with the FPC on October 26, 1970, seeking an order from the FPC declaring that a "curtailment program" set forth in that petition was "in accordance with the terms of United's tariff, and direct sales contracts." (P. App. 48a - 49a) The initial curtailments proposed by United to be effective for the period from November 1, 1970 - March 31, 1971 were so inconsequential as to have no adverse effect upon LP&L, and it agreed, along with

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[4] Also, confirming the stronger consumer attitude of the Louisiana Commission, see *United Gas Pipe Line Company*, 31 FPC 1152, at 1156, where it is recognized that Louisiana regulation was at a rate of 24.85¢ per Mcf while FPC was permitting 33.7¢.

virtually all of United's customers, to such program for the period until March 31, 1971 (A. 260), while protesting the jurisdiction of FPC over its direct sale contracts with United. (A. 259-260) However, on February 22, 1971 United filed a supplemental application with FPC for a fuller curtailment program to cover the period from April 1, 1971 to October 31, 1971. (A. 6-7) When United refused to remove LP&L from that program and honor its contracts with LP&L, this suit was filed on March 31, 1971, the day before United's program was to be effectuated as to LP&L (A. 3-12)

United continued to make filings in the Curtailment Proceeding from time to time, until the FPC finally issued its Opinion No. 606 (P. App. 48a et seq.) on October 5, 1971, holding that it had "plenary jurisdiction" of the curtailment plan proposed by United or any other pipeline company "relating to transportation both to resale and direct sale customers" (P. App. 74a).

We have stated earlier that United's curtailment program had as its purpose the obtaining of increased revenues for its gas. Among the filings made by United was one on May 17, 1971, proposing to change its tariff by providing for two new categories of service priority in prorating impaired deliveries. This filing proposed that power plant customers paying a rate less than the applicable city gate jurisdictional rate at 100% load factor in the same rate zone would occupy the lowest possible priority . . . *unless* the power plant customer agreed to pay the higher city gate rate. United's General Attorney, Mr. William Cassin, admitted that direct sale customers like LP&L would have to either pay a higher price for

gas or be curtailed pursuant to that filing. (A. 166)

Another filing by United, on March 31, 1971, was designed to limit United's obligations under "substitute fuel clauses" so that United would be relieved of its contractual obligation to pay its customers the difference between the price of gas obliged to be furnished by United and the cost of any substitute fuel that might have to be used a a result of any curtailment by United. Mr. Cassin admitted that this filing by United would also increase the price of fuel to its customers. (A. 167).

Still another proposal by United took place in the so-called "Certificate Proceeding", FPC Docket No. 71-89, calling for an increase in rates to certain customers, including LP&L, characterized as "non-compensatory" customers, which proposal would cost LP&L an additional 6.8¢ per Mcf at Nine-Mile Point, a station that uses some 80,000 Mcf per day. (A. 190-191; LP&L - Wyatt Ex. No. 3) *Just that one proposal by United represents an increase from LP&L alone of some $4,911,089 per year!*

Finally, as an upward thrust upon the United rates there is the original Curtailment Proceeding itself. As early as May 1968 United became aware of a decrease in its reserves and an impending possibility of some gas shortage. [RP71-29 Exhibits 29-31, Transcript 429-444 at 432 (6-15), 437 (3-10) and 443 (14) to 444 (14); FPC Exhibits 3-17, all introduced in the record before the District Court below] Yet, United continued after that time to take on new business. (RP71-29 Transcript pp. 3151- 3153; R. App. 1m - 3m) There is no necessity to belabor this brief with statistics showing that the price of gas has been increasing for the past eight or ten years,

and in fact the FPC is now permitting higher prices in an effort to revive exploration for new gas and bring out some of the existing shut-in gas. Thus, by the mere operation of United's basic curtailment program, without any of the revisions described above, United would receive *more* money for the *same* amount of gas. If A is selling 10 units to B for $2.00 per unit, then changes the transaction to sell only 7 units to B at $2.00 per unit and the remaining 3 units to C, a new customer, at $3.00 per unit, then A has obviously increased his revenues from $20.00 for the 10 units to $23.00 for the same 10 units. That is precisely what United seeks through the "Curtailment Proceeding."

B. The Certificate Proceeding

There has existed for many years in the depths of South Louisiana an integral, self-sufficient pipeline facility owned by United. Its location may be noted by examination of green lines on the map attached hereto as "Appendix P." That facility is commonly referred to as the "Green System" and it is the same facility described in the last sentence of the penultimate paragraph at p. 527 of *Louisiana Public Service Commission v. F.P.C.* 359 F.2d 525, cert. den. 385 U.S. 833, known as the "Florida Parishes" case.

United constructed the line to be an intrastate facility, has operated it as such, and consequently has never applied for a certificate. (See Commissioner Carver's comment on this at U. App. 127a) Not, at least, until it had become obvious, as admitted by United's General Attorney, that regulation by FPC would result in more favorable treatment than that accorded by the Louisiana

Commission. Accordingly, after illegally introducing small quantities of jurisdictional gas into this system, United filed its "Certificate Proceeding" in October 1970, requesting a certificate of convenience and necessity to permit it to continue operating the Green System. (P. App. 53a) Thus, United was requesting FPC to declare the Green System an interstate facility and take jurisdiction. The FPC granted United's request, holding in its Opinion 610 (over vigorous dissent) issued on February 9, 1972[5] that the Green System is an interstate facility over which it has jurisdiction, and remanded the proceeding to its Hearing Examiner for "initial decision" following receipt of additional evidence. Petitions for rehearing were filed on March 6, 1972, and upon FPC failing to act on those petitions within the 30-day period required by its Rules, Opinion 610 became final and was appealed to the Fifth Circuit by LP&L on April 7.

C. This Injunction Suit

In November 1970 LP&L intervened without avail in United's Curtailment Proceeding to the limited extent of protesting the FPC's jurisdiction of its direct sales contracts with United, and acquiesced in United's first curtailment program upon finding that it would have no effect on LP&L. However, on February 22, 1971,

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[5] FPC's brief (p. 8) says, "The decision by the Examiner was waived." That half-truth implies that the parties desired to bypass the Examiner. The fact is that United moved for waiver, a number of parties protested such waiver, preferring to have an initial decision by the trier of the facts and as a matter of expedition. But the FPC ordered the waiver (U. App. 92a), thus putting the Certificate Proceeding in the same dilatory posture as the Curtailment Proceeding, now pending over 17 months and still in the hands of an Examiner on threshold issues.

United filed with FPC a supplemental application proposing a fuller curtailment program for the period April 1-October 31, 1971. (A. 6-7) When United refused to honor its contracts with LP&L, this injunction suit was instituted in the Western District of Louisiana.

LP&L has a steam electric generating plant in Ouachita Parish, Louisiana, known as the Sterlington Station, consisting of four generating units varying in size from 32,000 kilowatts to 224,000 kilowatts. (R. App. 2j) These units were constructed between 1928 and 1958 when the supply of natural gas in North Louisiana was so abundant as to obviate the contemplation of an alternate source of fuel. (A. 185-186) LP&L's contract with United for supply of gas at Sterlington, as most recently amended, contains a maximum delivery obligation of 25,000 Mcf per day. In that contract there is also an "Impairment of Deliveries" article which reads as follows (R. App. 2j):

> "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."[6]

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[6] Upon comparing the "Impairment" article of LP&L's contract with the "Impairment" provision of United's FPC tariff (Appendix Q to this Brief) it will be noted that LP&L is in a more favorable position than United's "jurisdictional" customers. That comparison also holds true for United's other "non-jurisdictional" (direct industrial sale)

The gas to Sterlington is delivered through a United pipeline that is "certificated" by the FPC. All of the gas delivered to Sterlington Station is consumed there by LP&L as boiler fuel. (A. 188) The transaction is thus a classic and typical example of a direct industrial sale.

The circumstances are slightly different at Nine-Mile Point Station, located in southernmost Louisiana, in Jefferson Parish. At Nine-Mile Point there are four units ranging in capacity from 74,000 kilowatts to 750,000 kilowatts. (A. 186) These units were constructed between 1951 and 1971, and, although these are gas-fired units, provision was made for operating with fuel oil on an emergency (36 hours) basis. (A. 186) The contract with United for gas supply at Nine-Mile Point stipulated a maximum delivery obligation of 80,000 Mcf per day, and it also contains an "Impairment of Deliveries" article reading: (R. App. 4j)

> Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public

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customers (see our Brief in Opposition to Petitions for Writs, p. 7) which explains why only LP&L of all United's customers sued for an injunction.

In passing, we observe that this clause is clear and unambiguous and, contrary to FPC's suggestion, does not necessitate courts prescribing service priorities. Indeed, the FPC has recognized that contract interpretation is a matter for the Courts. *Rowan v. Allied Chemical Corp.*, 39 FPC 64 (1968)

> utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

In addition to the Nine-Mile Point contract being a direct industrial sale, it is also a sale from United's Green System, located wholly in Louisiana, transporting only Louisiana gas unmixed with any gas coming from another state or leaving Louisiana, and consumed by LP&L in Louisiana, and the delivery is thus made from an intrastate facility that has not been finally "certificated" by FPC.

The breach by United of the above described contracts was the basis for LP&L's injunction suit filed on March 31, 1971, the day before United intended to implement its curtailment plan. Once filed, the suit had a fast-moving chronology, briefly as follows:

March 31—Upon informing United counsel that LP&L was going to seek temporary restraining order from the District Court, a lengthy hearing was conducted by District Judge Dawkins. Pursuant to assurances given by United's counsel that the proposed reduction in gas delivery would be minimal (7/10 of 1%) for the April 1 - October 31 period, LP&L withdrew its request for a temporary restraining order and a briefing schedule was agreed upon and set by the District Judge. (A. 101)

April 26—United's dispatcher advised LP&L that United would deliver no more than 47,000 Mcf per day

to Nine-Mile Point Station (although that Station is entitled to 80,000 Mcf). (A. 101)

April 27—LP&L filed a Supplemental Complaint in the District Court, alleging the breach of the previous day (United actually did reduce its deliveries) and renewed its request for temporary restraining order. Again we advised United counsel of our intention to seek a T.R.O. and another lengthy hearing was held before Judge Dawkins,[7] at the conclusion of which he issued a temporary restraining order enjoining United from curtailing any gas deliveries to LP&L contemplated by the contracts. (A. 111)

April 28—FPC intervened and filed a motion to dismiss on jurisdictional grounds (A. 113), and United filed a similar motion the following day. (A. 115)

April 29—Without any hearing whatsoever, the District Judge dissolved the restraining order and dismissed LP&L's suit for lack of jurisdiction. (A. 116)

May 1—LP&L filed with U. S. Court of Appeals for the Fifth Circuit application for writs of mandamus and certiorari and alternatively for expedited appeal, and a motion for injunction pending appeal. This date was a Saturday and no contact was successful with either United or FPC. The matter was submitted to the Circuit Judge to whom it was allotted, Judge John Minor Wis-

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[7] Despite our suggestion to desist, FPC has again in its Brief (p. 9) (as it did in its Petition for Writs) characterized the hearing of April 27 as "*ex parte*." That characterization is as mendacious as it is irrelevant. United and Pennzoil (the two named defendants) were represented by several counsel, and, in the words of the District Court, the matter was "heard contradictorily." (A. 111) This is really of no moment to a case as important as this, but we believe the record should be straight.

dom. He reinstated the restraining order of April 27 pending consideration of the application for writs. (A. 117)

May 5—A two-hour hearing was conducted in San Antonio, Texas, by a panel of Circuit Judges Wisdom, Coleman, and Simpson, at which all parties fully participated. (A. 120)

May 14—The Court of Appeals vacated the District Court judgment of dismissal, remanded the case to the District Court for expedited hearing on the jurisdictional issue, and continued the stay issued on May 1 in effect pending hearing and judgment by the District Court. (A. 21)

May 27—District Judge Scott[8] conducted a hearing on the jurisdictional issue pursuant to the FPC and United motions, at which hearing the FPC and United presented a full case, including two witnesses, many exhibits, and the transcript of the FPC Curtailment Proceeding. (A. 138-182)

June 30—The District Court dismissed LP&L's suit on jurisdictional grounds. (A. 266-267)

Thereafter, upon expedited appeal by LP&L, the Court of Appeals heard argument on November 18, and issued its decision on January 14, 1972, reversing the District Court and remanding the case for hearing on its merits. (P. App. 1a - 29a) From that decision the writ herein was granted on March 6, 1972.

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[8] We requested Judge Dawkins to recuse himself, and he did so.

It is essential, before leaving the subject of LP&L's suit, that it be understood that LP&L's injunction suit did NOT name the FPC as a party; it did NOT seek to attack in any manner or affect in any way the FPC-United curtailment proceeding, and indeed the only effect upon such curtailment proceeding would have been, and is, the removal of LP&L (and indirectly any other direct industrial customer) from such proceeding. (A. 2-11, 101-104) Of course, as pointed out in Footnote 6 hereinabove, the removal from the curtailment proceeding of the direct industrial customers (other than LP&L) will not affect the curtailment proceeding because their contracts give them no advantage over United's filed tariff.

III. SUMMARY OF ARGUMENT

1. re: Direct Sale Issue

This controversy involves an effort by a private party, United, to use a contrived "shortage" of gas, and a manipulation of pipeline facilities from State to Federal regulation, both moves accomplished through a willing administrative agency, the FPC, United's purpose being to increase its revenues and FPC's purpose to extend its jurisdiction into an area repeatedly requested from, and rejected by, Congress. FPC Commissioner Carver has aptly described United's maneuvers as:

> "[T]he present efforts to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise."

Two of the contracts Mr. Carver referred to are those at issue in this suit, the direct sales of gas to LP&L for its consumption. To prevail in this suit, United and the

FPC[9] ask this Court to extend FPC's jurisdiction to such direct industrial sales for consumption and extend FPC's jurisdiction to *intra*state pipeline facilities. Such extensions of jurisdiction would do violence to the language of the Act, would contradict its legislative history, would be in conflict with settled jurisprudence of this Court, and would be at odds with all pertinent equitable considerations.

The jurisdictional boundaries of the Act are set forth in Section 1(b). After saying the Act shall apply to "the sale in interstate commerce of natural gas for resale", that section says that it shall not apply "to any other . . . sale of natural gas." This Court has held that language to mean,

> "Direct sales for consumptive use of whatever sort were excluded."

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 68 S.Ct. 190 (1947). However, FPC says it should have jurisdiction by reason of Section 1(b) making the Act applicable to "transportation of natural gas in interstate commerce." Attempting to strain "transportation" to cover direct sales would make a self-contradiction of the direct sale exemption: On one hand, the proviso in Section 1(b) says that "*any* other sale" is exempt, while FPC on the other hand is saying *only* those direct sales transported *intra*state should be exempt.

FPC's "transportation" theory is overwhelmingly con-

[9] The positions and arguments of FPC include all of those advanced by United, and we will accordingly hereafter refer only to FPC for easier consideration.

tradicted by the legislative history. Every debate and report of Congress consistently indicated the intention to exempt direct industrial sales even when the gas is carried through *interstate* facilities. A fair example is provided by House Report No. 709, 75th Congress:

> "The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character . . . There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction."

The decisions of this Court are irreconcilably opposed to FPC's "transportation" argument. In *Panhandle-Indiana,* a case involving a State effort to regulate terms of service as well as the sale itself, this Court held that *all* direct sales for consumptive use were exempt from FPC jurisdiction. Even more dispositive is *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 81 S.Ct. 435 (1961). That case involved a certificate proceeding for transportation of direct sale gas. Chief Justice Warren re-affirmed that a direct sale "is not subject to the Commission's jurisdiction except insofar as §7 requires the Commission to certificate the transportation of gas pursuant to the sale", i.e., an *initial* sort of jurisdiction, and then unequivocally ruled that FPC—

> ". . . can *only* exercise a *veto power* over proposed transportation . . ." (Emphasis ours)

and rejected the "complete allocation power" sought by FPC there . . . *and here.*

All pertinent equitable considerations are at odds with the FPC contentions. FPC has repeatedly asked Congress

for authority over direct industrial sales, including curtailment and allocation power, most recently in 1970, and Congress has refused each time. *One of the most convincing evidences of an agency not having jurisdiction is its own admission that it has none.*

In terms of "human needs" FPC's desire to adopt "comprehensive curtailment policies" is not in Louisiana's best interest. What FPC terms an "inferior" use (boiler fuel) is not inferior in Louisiana where the prime need for fuel is to *cool* homes, hospitals, schools, and plants and that is done with electricity made from gas. Nor is there any basis for FPC's sudden concern with human needs since the objective facts at hand indicate there is gas available (Federal Register, Vol. 37, pp. 5844-45) in sufficient quantity to permit distributing companies, like Long Island Lighting Company, to predict the ability to "meet all the demands for gas by its firm gas customers." (Appendix S)

Finally in terms of equity, construction of huge generating plants must be carefully planned since, as is the case here, from $30,000,000 (at Sterlington) to $84,000,000 (at Nine-Mile Point) is invested. A firm supply of fuel must be assured. Acting on the state of law and jurisprudence, LP&L was assured of a firm supply of gas, and FPC has offered nothing to justify disregard of the Act and this Court's decisions.

2. The Green System

A glance at the folded map (Appendix P) at the rear of this Brief will give a good understanding of the location and configuration of the "Green System." It is

obviously an integral, separate pipeline facility located wholly within Louisiana and among and over some of this Nation's largest gas fields. This Green System was designed and constructed as an intrastate facility and has been serving LP&L at Nine-Mile Point since at least 1959 without any FPC certification. It was specifically excluded from jurisdictional consideration in the *Florida Parishes* case. (*Louisiana Public Service Commission v. F.P.C.*, 359 F.2d 525, at 527) Yet, United in October 1970 filed a "certificate proceeding" to change the jurisdiction of this facility from the Louisiana Commission to FPC. In order to lay a basis for such change, United in 1970 dumped a small amount of gas from an interstate facility (the "Black System") into the Green System.

The jurisdictional status of the Green System was raised in the District Court by FPC's motion to dismiss. The issue was fully tried, and through United's own witnesses it was shown that the Green System was entirely separate from the Black System, operated at lower pressure, no gas could reach the Black System from the Green System, and the only way that gas could get from the Black to Green System was by United deliberately manipulating valves. It was also shown that a producing company under the same control as United has sufficient gas available for use in the Green System to obviate the movement of any Black Gas into the Green System.

On those facts the Fifth Circuit held that "the channel of constant flow is intrastate." Upon the tests prescribed in *California v. LoVaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, the Fifth Circuit should be affirmed.

FPC has argued that LP&L should have been required to exhaust its administrative remedies re the Green System. That contention is now mooted by FPC's Opinion 610 becoming final and having been appealed on April 7, 1972. In addition, FPC's contention on exhaustion is contra to *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251. Finally, FPC cannot grant injunctive relief or award damages, and thus cannot provide LP&L an adequate remedy. Inadequacy of remedy has been recognized as a sound basis for not requiring exhaustion. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445.

IV. ARGUMENT

Federal jurisdiction being invoked here on grounds of diversity of citizenship and for breach of contracts involving the requisite jurisdictional amount, the motions of FPC and United to dismiss were grounded in the proposition that the FPC had either exclusive or primary jurisdiction, and that, in the latter event, LP&L was required to exhaust its administrative remedies before proceeding to court. Of course, the syllogism is incontestable that if FPC lacks jurisdiction, then it has no remedies available, and there are no administrative remedies for LP&L to exhaust. Manifestly then, if these contracts are for direct sales to an industrial customer for consumption, and such sales are exempt from FPC jurisdiction as held by the Court of Appeals, its decision should be affirmed. Similarly, but separately from the direct sale issue, if the gas supply at Nine-Mile Point is delivered from an intrastate facility, then the FPC has no jurisdiction and the decision of the Court of Appeals to that extent should be affirmed.

1. The Direct Sale Issue

The FPC argument in essence is that it has plenary jurisdiction arising out of Section 1(b) of the Act (15 U.S.C. §717, *et seq.*) that includes direct industrial sales, said jurisdiction stemming from its "transportation" authority. That argument is in conflict with the plain language and structure of the Act; in contradiction of the clear legislative history; diametrically opposed by the decisions of this Court and the interpretations of those decisions by the various Courts of Appeal; and at odds with all of the pertinent equitable considerations.

a. The Language and Structure of the Act

Section 1(b) of the Act is the provision that spells out the jurisdictional boundaries of the FPC. That section reads:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas" (Emphasis added)

Because the States had been regulating certain aspects of the gas industry, and Congress was attempting to preserve that regulation while closing the regulatory gaps beyond the reach of the States, that jurisdictional

section was carefully drawn in 1938 to specifically describe the areas to be regulated by FPC and specifically reserve to the States those areas of regulation they had covered or could feasibly cover: *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, at 514-516, 68 S.Ct. 190, 194-195 (1947). Direct sales to local consumers involving gas transported through interstate pipelines were recognized as an area of permissible State control. *Pennsylvania Gas Company v. Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279 (1920). For that reason, Section 1(b) was designed to specifically leave the direct sale area to State regulation. In the words of this Court in *Panhandle-Indiana:*

> "This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other . . . sale . . .* (Emphasis added) Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' *Direct sales for consumptive*

use of whatever sort were excluded." (Emphasis added)

In order for the FPC contention to be correct, i.e., that it has jurisdiction of these LP&L contracts because of the language in Section 1(b) that this "Act shall apply to the transportation of natural gas in interstate commerce", it would have been necessary for Congress to have worded the conservatory proviso to read:

> "but shall not apply to any other transportation or *to the intrastate* sale of natural gas *for consumption*". (Emphasis indicates wording necessary to support FPC contention)

That becomes evident upon realization that FPC is urging that "transportation" does not mean just "transportation", but also includes "direct sale for consumption" if the sale is effectuated through use of an interstate pipeline. Putting it another way, FPC is claiming that the only transactions beyond its jurisdiction are direct sales through *intra*state facilities. It is too plain to harbor an argument that Congress knew in 1938 of the *Pennsylvania Gas* case and knew that frequently direct sales were accomplished through the use of interstate pipelines. If the Act were designed as the FPC argues, the proviso in Section 1(b) would, in the light of that Congressional knowledge, have had to contain a restriction on the exemption for direct sales; otherwise, the direct industrial sale exemption would be a self-contradiction because it says on the one hand that "*any* other . . . sale of natural gas" is exempt, and the FPC on the other hand is saying that *only* those direct industrial sales transported *intrastate* are exempt.

The other possibility of the FPC contention having any validity would lie in reading the proviso in such a way as to treat "transportation" conjunctively with "sale", i.e., "but shall not apply to any other transportation *and* sale of natural gas", rather than disjunctively. By coupling "transportation" with "sale", it could be argued that the direct industrial sale exemption applied only to a sale accomplished through intrastate facilities. But this Congress did not do.

It must be therefore concluded that the FPC argument re: transportation is in conflict with the plain language of the Act.[10]

b. The Legislative History

There is a noteworthy absence in FPC's brief of any reference to the legislative history of the Act. Small wonder! The history of this Act in Congress overwhelmingly contradicts the "transportation" theory espoused by FPC.

The original bill to regulate the transportation and sale of gas in interstate commerce was offered in 1936. The principal report thereon, House Report No. 2651, 74th Congress, 2d Session, from the Committee on Interstate and Foreign Commerce, contained the following passage in explaining the purposes of the bill:

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[10] FPC presents an elaborate discourse (pp. 26-34) in analysis of its authority under Sections 4, 5 and 16 of the Act, and the interrelationship of those provisions all premised on the hypothesis, "If . . . the Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial customers." (p. 26) In view of the complete invalidity of that hypothesis, as shown above, no response is made to the FPC discourse other than to say plainly that *IF* the Act gave FPC jurisdiction over direct industrial sales for consumption, then obviously FPC would be able to regulate those transactions, including rates and other terms.

"This bill, if enacted, would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. The bill confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce and the sale of such gas for resale to the public, but does not apply to any other sale of natural gas or deprive a State of any lawful authority over the distribution and sale of natural gas locally. *The sale of natural gas for industrial use only is also exempted from the jurisdiction of* the Commission." (Emphasis added)[11]

By the following year the bill had gained impetus, and the Committee on Interstate and Foreign Commerce issued a further report on the bill, then numbered H.R. 6586, in House Report No. 709 of the 75th Congress, 1st Session, a pertinent part of which reads:

"The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. *The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character* and in the absence of congressional prohibition subject to State regulation. (See Pennsylvania Gas Co., v. Public Service Commission (1920), 252 U.S. 23) *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.*" (Emphasis added)

That passage, without more, puts at rest the FPC theory that its "transportation" jurisdiction reaches a di-

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[11] The word "jurisdiction" is not qualified. It does not say "*rate* jurisdiction". The exemption is plenary.

rect sale when such sale is made through interstate facilities. Congress obviously was aware of *Pennsylvania Gas*; recognized that the direct sales regulated by the States were at times made through use of interstate pipelines; and stated its unqualified intention to leave such regulation undisturbed.

The floor debate on H.R. 6586 was interesting in that one of the prime inquiries was with respect to direct industrial sales. At 81 Congressional Record 6721 (75th Congress, 1st Session) there appears the following colloquy involving Representative Lea, spokesman for the bill:

> "MR. THOMPSON of Illinois. Is there anything in this bill that would affect the relationship through which the large industrial consumer buys natural gas directly from the pipeline company or agency?
>
> MR. LEA. The question there involved is whether the purchase is for private consumption or resale to the public.
>
> MR. THOMPSON of Illinois. It would be for private consumption.
>
> MR. LEA. If it is for private consumption, *it would not be affected by this act.* If it were for public consumption, the gas rate would be regulated." (Emphasis added)

A few minutes later (at p. 6724), Mr. Halleck of Indiana, another spokesman for the bill, had the floor and this colloquy occurred:

> "MR. HOUSTON. That is right. *When an*

> *interstate company brings gas into a State and turns it over to a distributing company for industrial needs,* it is regulated under this bill?
>
> MR. HALLECK. *If they sell to the industrial user who is to use it rather than resell it, they are not reached by this bill*; but if they sell to a distributor who distributes, say, to commercial users and domestic users, then that commercial use would be reached by this bill."

Again there is the recognition that some direct industrial sales will be made by transportation of gas through interstate lines, and the Congressional intent was clear that such transactions were to be unreached by this Act.

Deserving of note is Senate Report No. 1234, 78th Congress, 2d Session, wherein the then Chairman of the FPC, Leland Olds, submitted an FPC report on gas conservation . . . not rates, but conservation. In that report the FPC opined that there were two defects in its authority under the Act:

> "One is its lack of authority to suspend rates for the sale of gas for resale for industrial use; and the other, the Commission's *lack of jurisdiction to regulate direct sales* of natural gas to industrial consumers." (Emphasis added)

Exhaustive review of the whole legislative history of the Act reveals nothing contrary to the above. Two propositions are entirely evident from this history: First, Congress had no intention of qualifying the exemption of direct industrial sales from regulation by the FPC; no limiting word such as "rate" was used when Congress said such sales were to be "exempt from jurisdiction;" secondly, Congress recognized, indeed emphasized, that

some direct industrial sales were made by means of *inter*state pipelines, and that they should be as exempt from FPC jurisdiction as direct sales made through *intra*state pipelines. This foregoing legislative history completely contradicts the FPC contention that direct industrial sales made through interstate pipelines are within its "transportation jurisdiction."

c. The Decisions of this Court and the Interpretations of Those Decisions by The Courts of Appeal.

It is advantageous to a productive discussion of this Court's decisions to first put the issue here in perspective. LP&L's suit, as mentioned earlier, does not seek to enjoin or hinder FPC in its conduct of curtailment proceedings, but only to require United to deliver the gas for which it contracted. FPC is presenting to this Court a suggestion not at issue here, i.e., that it needs the authority to curtail *all* customers, including direct industrial consumers, in order to make a fair allocation of gas. That issue is plainly for Congress. The issue here is whether FPC has authority to regulate — and so curtail — direct industrial consumers.

A close look at two key decisions of this Court [*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 68 S.Ct. 190 (1947); and *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 81 S.Ct. 435 (1961)] is indicated by the fact that both the FPC and LP&L are relying upon those cases, and the Court of Appeals used them as its guidelines in reaching the decision under review.

Panhandle-Indiana involved an effort by a pipeline com-

pany to make direct industrial sales in Indiana. The Indiana Commission initiated hearings relative to that direct service, and the pipeline company sought to enjoin the Indiana Commission from regulating (rates *and service* were at issue) these direct sales on grounds that these were interstate transactions and the FPC had exclusive jurisdiction. In affirming the Indiana Supreme Court holding that the Indiana Commission had jurisdiction to fully regulate these direct industrial sales, this Court described the dual regulation envisaged by Congress in Section 1(b) and then drew the clear and clean line insofar as relates to the issue here:

> "This section determines the Act's coverage and does so in the light of the situation existing at the time.' Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> "The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other . . . sale . . .*' (Emphasis added) Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded.

> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed."

This quoted language is even more meaningful to this case when it is recognized that in *Panhandle-Indiana* the state commission was seeking to *fully* regulate, i.e., not only the rate but the terms of service as well.

The facts in *Transcontinental* were different in that the direct sale aspect there was remote, and transportation was the primary issue. A New York electric utility company contracted with Texas producers for the purchase of gas, and it was to be transported from Texas to New York through Transcontinental's pipeline. This necessitated obtaining a "transportation certificate" from the FPC. The certificate was denied by the FPC on policy considerations, including end-use and price-effect factors in a certificate proceeding. After affirming again that a direct sale "is not subject to the Commission's jurisdiction except insofar as §7 requires the Commission to certificate the transportation of gas pursuant to the sale," this Court turned to the transportation question. Chief Justice Warren found that the FPC did have the authority to consider in a certificate proceeding such matters as end-use and price effects, but that the certificate authority of FPC was limited, and he then said: (at 365 U.S. 17)

> "The Commission cannot order a natural gas company to sell gas to users that it favors; *it*

> *can only exercise a veto power* over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." (Emphasis added)

The square pronouncement by Chief Justice Warren that the FPC transportation jurisdiction involving a direct sale was limited to "*veto* power" should be dispositive of this jurisdictional issue. But the FPC has desperately grabbed at a straw of dictum from *Panhandle-Indiana* in an effort to overcome the limitation in *Transcontinental*. At the close of the *Panhandle-Indiana* opinion, Mr. Justice Rutledge engaged in an answer to one of the appellant pipeline's arguments that a conflict might arise between State and Federal regulation when interruptions of service arose from weather or other conditions, and it was said that, "Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." That remark was obviously dictum unrelated to the holding in the case. Additionally, there is no way to determine what Mr. Justice Rutledge may have had in mind; the most probable possibility (upon referring to Footnote 23) is that he had reference to those provisions of the Act that contemplate State-Federal co-operation, even in instances where the FPC has no jurisdiction. [Section 5(b), 11, and 17] In any event, common sense tells that the Court could not have been by that one statement granting to FPC a plenary and continuing jurisdiction over direct industrial sales, particularly when such an effect would completely contradict the holding of the case. Moreover,

if that dictum had the effect suggested by FPC, how could this Court have held in *Transcontinental* that the jurisdiction by FPC in a transportation certificate proceeding was limited to a "veto power?" Why would this Court have spent 31 pages to reach a conclusion that within that "veto power" the FPC could consider end uses and price effects, if, as the FPC argues here, its "transportation jurisdiction" is unrestricted and unlimited? For, if that be the case, the Court need not have concerned itself with what matters the FPC could look into for initial certificate purposes since the FPC's jurisdiction would be a continuing one which at all times would include a right to review use and price factors. If the FPC contention here had any merit, and it has such unrestricted allocation power, why did Chief Justice Warren say (at p. 18) that,

> "[I]t is clear that the Commission fully realizes the distinction between the power it enjoys under § 7 *and complete allocation power.*" Emphasis added)

For still another decision by this Court holding that a direct industrial sale, even though made through an interstate pipeline, is subject to the *full* regulation of a State commission, see *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777 (1951).

The decisions of the Courts of Appeal are consistent with *Panhandle-Indiana* and *Transcontinental. City of Hastings v. Federal Power Commission*, 221 F.2d 31 (D.C. Cir. 1954), a rate and contract dispute; *Granite City Steel Company v. Federal Power Commission*, 320 F.2d 711 (D. C. Cir. 1963), an allocation case; and *Colorado Inter-*

state Gas Co. v. Federal Power Commission, 185 F.2d 357 (3d Cir. 1950), an attempt to make a gas tariff applicable to direct industrial consumers. These cases uniformly rejected attempts to extend FPC regulation to direct industrial sales, whether the dispute involved rates, contracts, tariffs, or allocation of gas.

Colorado Interstate is an interesting case in that it dealt with an attempt by the FPC to require a pipeline company to make certain of its tariffs applicable to direct industrial consumers. That is precisely what the FPC is seeking to do here, by requiring United to revise its tariffs with respect to allocation to make them applicable to LP&L and others similarly situated. (P. App. 48a-76a) On this score, the Third Circuit in *Colorado Interstate* quoted from the description of jurisdiction in *Panhandle-Indiana*, supra, and then said:

> "Nothing need be added to this clear statement of coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale."

It is particularly significant to the instant issues that the tariffs in the *Colorado Interstate* case were not for new customers and thus an initial situation, but were tariffs being revised to cover existing exempt consumers, as is being attempted here.

In summary, the decisions by this Court, and the Circuit Courts' interpretations of these decisions, are consistent in teaching that: (1) Direct industrial sales for consumption are exempt from FPC jurisdiction, and (2) Section 7 proceedings, whether for transportation or sale, are limited to an initial or originating nature, characterized unambiguously by this Court as "only a *veto* power," and rejecting the "complete allocation power" sought by FPC.

d. The Equitable Considerations

(i) Some Recent Legislative History

The FPC says at p. 26 of its Brief that Congress has vested it with authority to deal with the curtailment problem in Section 1(b). If that be so, why the statement by FPC quoted in *Hastings*, at Footnote 3 (221 F.2d, at 33) admitting that it had no jurisdiction over direct industrial sales and that such authority had been sought from Congress without avail. That was in 1954.

No change took place in the Act from 1954 to 1963. In the Congressional Record for June 19, 1963 there appears a statement from the then Chairman of FPC, Joseph C. Swidler, reproduced fully as Appendix O to LP&L's Brief in Opposition to Writ Applications. Briefly, here are Chairman Swidler's comments about "existing law":

> "Under existing law the Commission's authority is limited to sales for resale in interstate commerce; hence, the price *and other terms* of a direct sale by a pipeline to an industrial consumer are outside the sphere of this Commission's regulatory authority.
>
> * * *

> "For these reasons—protection of industrial consumers, prevention of wide-spread field price increases under existing contracts, and removal of present incentives to withhold gas from local distributors in order to make it available for direct industrial sales—the Commission strongly recommends that it be given jurisdiction over direct industrial sales by natural gas companies. This authority will enable the Commission to require that interstate industrial gas sales will be made at such prices and *on such terms* as to realize the potential benefits of such sales to both industrial and domestic consumers." (Emphasis added)

Notwithstanding, Congress was unwilling to extend the FPC's jurisdiction as urged by Mr. Swidler and S. 1734 failed. Most recently, in its Annual Report to Congress for 1970, the FPC again acknowledged its lack of jurisdiction, *in curtailment and allocation procedings*, over a nonjurisdictional transaction or customer. In that Report (p. 8), the FPC recommended to Congress that it enact—

> "a new subsection to Section 7 of the Natural Gas Act [that] would enable the Commission to determine when an emergency exists so as to require . . . *load curtailment and allocation* of gas by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction."

We submit that one of the most convincing evidences of an agency not having jurisdiction is its own admission that it has no such jurisdiction.

(ii) The "Human Needs" Claim

Running like a thread through FPC's Brief is the claim that it must have plenary authority over curtailments (even where it has no jurisdiction) because only the FPC knows what is in the public interest in the light of *all* contractual arrangements and the needs of *all* customers. Although the statement is an absurdity on its face, it must be considered since it is the foundation of FPC's whole "needs" argument for plenary jurisdiction.

By application of common knowledge, it is undisputably so that (1) in Louisiana the need for energy is principally for cooling and not heating, and (2) this area has no coal or hydro-electric energy closely available. It is obvious under these circumstances that the Louisiana Commission will have a better knowledge of the "public interest" in Louisiana in terms of gas usage than the FPC. What the FPC terms an "inferior" gas use, i.e., for boiler fuel, is not at all inferior in Louisiana where the great need for fuel is to cool homes, hospitals, schools, and plants, and to supply electricity for the operation of sophisticated petro-chemical and mineral plants. Many of those plants are located in Louisiana because of the proximity of gas and oil, just as steel plants have located near Pittsburgh because of its natural resources for steel-making nearby. There can be no doubt that the Louisiana Commission, made up of elected officials, will be more responsive to the needs of Louisiana citizens in allocating the use of gas. Unlike the East and Midwest with coal, oil, and hydro-electric power for alternates, the electric generating plants in Louisiana were constructed for the use of gas almost exclusivly, with only a few having a capability of burning oil as an emergency fuel. (A. 185-6, 243) It is because of that difference in alternatives that

the sales to industrial customers by the pipelines who are supplied by United (the five who are *amici* herein) are for the most part "interruptible" sales, service provided when gas is readily available and which may be interrupted usually at the judgment of the pipeline. Conversely, because of the fuel problems in Louisiana, practically all of United's direct sale contracts are for "firm" service, i.e., a specific obligation by United to furnish a certain amount of gas per stipulated period.

(iii) Is There Really A Gas Shortage?

As Commissioner Carver said, and as we have suggested, United's "curtailment program" actually has another purpose: To extricate it from "improvident" contracts and obtain increased revenues. That immediately suggests the question of whether there is really a shortage, or a shortage of such proportions as to warrant the drastic remedy of violating the jurisdictional boundaries of a Federal statute.

The gas is available. It is just a case of paying enough to bring it out of the ground. During the short period while this Brief was in preparation, there appeared in the Federal Register of March 22, 1972 several notices of applications to the FPC for certificates authorizing the sale for resale of natural gas to United and to Transcontinental Gas Pipe Line Corporation, just those applications for that day aggregating 255,000 Mcf per month. (Pages 5844 - 5845, Federal Register, Vol. 37, attached as Appendix R herein).

At the other end of the pipeline, we have taken what we believe is a fair sampling of the most recently filed Annual Reports of distributing companies, from the New

York area, the Midwest, and the West. (Long Island Lighting Company, Appendix S hereto; Consumers Power Company, Appendix T hereto; Dayton Power & Light Company, Appendix U hereto; and Public Service Company of Colorado, Appendix V hereto). All of those Reports carry the same message on gas supply: Gas is in temporarily tight supply, but all existing demands can be met, and in most instances ordinary growth can be handled. For example, Long Island Lighting says:

> "Despite the curtailments previously mentioned, the Company has every confidence that it will meet all the demands for gas by its firm gas customers.
>
> "Neither the gas supply situation nor the Commission order affect the continued availability of gas for existing residential customers."

And Dayton Power says:

> "The Company's gas sales will continue to increase as additional users, whose service was committed by the Company prior to the sales restrictions, are connected and also as the requirements of existing customers increase. These increased requirements are within the Company's suppliers indicated available delivery volumes."

After announcing that its gas availability is up by 11.2% over the 1970-71 peak day capacity, Public Service Company of Colorado says,

> "The Company, therefore, does not anticipate any unusual problems in meeting normal requirements for natural gas in its service area during the 1971-72 contract year."

The most recent filing by United of its curtailments that we have available, for November 1971, shows that it was delivering *more* gas to its industrial customers than the allocated volume. (See Appendix W hereto)

On the foregoing, we are constrained to assert a serious question as to United's "shortage."

(iv) Importance of Direct Sale Exemption

The construction of a large electric generating plant is a costly venture. For example, LP&L's investment in the Sterlington Station is $30,000,000 and at Nine-Mile Point about $84,000,000. (A. 10) To convert LP&L's generating facilities, including but not limited to Sterlington and Nine-Mile Point, to burn fuel oil and meet air quality standards would cost some $180,000,000. (A. 243) These figures eloquently point up the importance of an industry being assured of a firm supply of gas (or whatever the fuel of the region happens to be) before constructing its facilities. LP&L did so here. It acted on the state of the law that the Act granted an exemption for direct industrial sales; and upon the fact that the pipeline serving it at Nine-Mile Point was an intrastate facility upon which a certificate from FPC was not even necessary. All over this nation, investments have been made and facilities constructed on the basis of *Panhandle-Indiana* and *Transcontinental*. FPC has offered nothng here to justify as a matter of equity the disregard of the language of the Act, its Congressional history, and the decisions of this Court.

2. The Intrastate Situation At Nine-Mile Point

a. The Nature of the Green System

In addition to the direct industrial sale exemption ap-

plicable to both Sterlington and Nine-Mile Point, there is another preclusion of jurisdiction by FPC at Nine-Mile Point: The fact that the gas furnished to LP&L at Nine-Mile Point is produced, transmitted, and consumed wholly in Louisiana. In the vernacular, LP&L is buying "intrastate gas" at Nine-Mile Point. Section 1(b) of the Act exempts "intrastate gas" from jurisdiction. *F.P.C. v. Transcontinental Gas Pipeline Corp.*, supra, at p. 17:

> "Moreover, the Commission has no authority over intrastate sales under any section of the Act."

Upon the following facts, all adduced from United management representatives, the gas received and consumed at Nine-Mile Point is indeed "intrastate gas:"

(a) All of the gas transmitted to LP&L at Nine-Mile Point by United is produced in Louisiana: (A. 212)

> "Q. Mr. Nelson, do you know enough about the system of United to be able to tell me if there is any gas that goes to that green system that is produced in any state other than Louisiana?
>
> A. No, sir. There is no gas produced in another state, other than in Louisiana, going into that system."

(b) All of the facilities (the "Green System") that transmit the gas to LP&L at Nine-Mile Point are located wholly in Louisiana. (See map, LP&L-Belvin No. 1, attached hereto as Appendix P; A. 223)

(c) All gas placed in the Green System is sold by producers to United with the contractual limitation that

the gas not be transmitted out of the State of Louisiana; (A. 213)

"Q. Now, do any of those contracts, that you have with producers, contain what I refer to as a restrictive provision?

A. Yes, sir.

Q. That is provision that restricts the gas that they produce and sell to you to transmission, delivery and consumption, wholly within the state of Louisiana.

A. The contracts that we have on the green system, the number of contracts that we have on the green system have provisions in them that does not allow us to take them out of the state."

(d) The contracts also stipulate that the gas is not to be commingled with gas being transmitted out of Louisiana. (Mr. Belvin's prepared testimony in FPC No. RP71-29, at p. 184, offered in evidence herein at A. 182).

(e) The Green System is an integral, separate, self-sufficient pipeline system: (A. 180)

"Q. Well, let me just describe it another way and we will get it clear. Aren't the pressures in the black system different from the pressures in the green system?

A. Yes.

Q. And in order for gas to get from the black into the green system, you have to turn a valve, do you not, or some kind of meter?

A. You can separate the two with a valve, but there is a measuring device or regulating device to let the gas flow.

Q. What I am getting at, Mr. Echterhoff, as Mr. Belvin told us, under oath that there were valves and regulators, regulating devices such that the green system could be completely closed off from the black system. Now, is that correct.

A. That is correct.

Q. That is what I meant when I talked about being an integral system. Now, in order for somebody to put black gas in the green line, they would have to turn a valve or other regulating devices, do they not?

A. Yes."

(f) And the Green System is capable of keeping and delivering the gas wholly within Louisiana: (A. 221)

"Q. Yes, sir, in fact, that is my next question. You stated, in your testimony, that the green system was, and I am quoting now, 'capable of keeping the gas wholly within the state of Louisiana,' isn't that correct?

A. Yes, sir, that is correct."

(g) For the 12-month period ending July 31, 1970, United put into the Green System the net amount of 155,060,928 Mcf of gas wholly from onshore Louisiana gas fields (LP&L-Barnett No. 2), and delivered all of that gas, minus losses, to customers in the New Orleans District of Louisiana (LP&L-Barnett No. 1). 4,015,000 Mcf, approximately 2.6% of the total, was introduced

into the Green System from the "Black System", a transmission facility that eventually takes some of its gas across State lines. (LP&L-Barnett No. 2)

(h) A wholly-owned subsidiary of Pennzoil-United, known as Pennzoil Producing Company, produces gas in the Lirette and Bay Baptiste Fields in close proximity to the Green System in amounts far in excess of the 4,015,000 Mcf introduced into the Green System by United. (A. 232) Thus, Pennzoil and United have the means available to assure that *all* of the gas going into the Green System does not first have to go through the Black System. (A. 236-237); LP&L-Barnett No. 3; A. 167-168) Consequently, any gas from the Black System that gets into the Green System results from a purely arbitrary choice by United without respect to need, presumably for the purpose of attempting to confer jurisdiction on the FPC.

Unlike the situation in the *Florida Parishes* case, supra, there is no intermixing of *intra*state gas "during transportation with that to be sold *inter*state", only one type of sale (*intra*state) is made from the Green System, and those sales are not "taken from a commingled stream" but from a carefully measured quantity being transmitted through a closed, self-sufficient system of *intra*state pipes.[12]

Instead, because of the foregoing facts, the Fifth Circuit found that the Green System met the tests set

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[12] In *Florida Parishes*, 359 F.2d, at 527, the Green System was specifically excluded from consideration:

> "The question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the Commission has not asserted jurisdiction."

forth by this Court in *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486 (1965), and that, "The channel of constant flow is an intrastate and not an interstate channel." The holding below was not, as the FPC suggests, based on *de minimis* considerations, but upon the flow concept established by this Court in *LoVaca.*

b. The Exhaustion of Remedies Contention

While the FPC has abandoned its contentions with respect to "exhaustion of remedies" in connection with the direct industrial sale issue (FPC Brief, p. 16), the FPC persists in the exhaustion contention with respect to the question of jurisdiction of the Green System.[13] Relying upon *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938) and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 82 S.Ct. 1237 (1962), the FPC urges that the Court of Appeals unjustifiably refused to defer to the Commission for an initial determination of the status of the Green System.

That contention overlooks the basic fact that the FPC voluntarily intervened in the District Court, and participated fully in the making of a record in an attempt to support its position that the Court should dismiss LP&L's suit because it had no jurisdiction and because the FPC did have jurisdiction. Accordingly, the FPC was a *full* participant in making a *full* record on the status of the Green System. Under those circumstances, we suggest the contention of FPC is disposed of by *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251 (1949). In that case, a

[13] It would seem that a similar abandonment is in order as to the Green System in view of FPC's Opinion 610 asserting that it has jurisdiction of the Green System being also now on appeal.

pipeline company sold leases covering a portion of its gas reserves without approval of the FPC. The FPC ordered an investigation under the Act of this transfer, and instituted suit in U.S. District Court for a temporary restraining order and preliminary injunction. The district Court initially granted the temporary restraining order, but, after hearing, refused to grant a preliminary injunction. The Third Circuit affirmed, holding that the FPC had no jurisdiction. On that issue, this Court held:

> "To be entitled to judicial assistance, however, the order issued by the Commission must be valid and based on a statutory grant of power to the Commission. As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales. A proposed transfer cannot be stopped by the Commission. It should not be permitted to delay what it cannot prevent."

Similarly here, the Commission cannot certificate a pipeline over which it has been held to have no jurisdiction in a hearing in which it was a full participant in the development of facts. To the same effect, see *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470, 50 S.Ct. 374 (1930); 1b *Moore's Federal Practice* 655, *et seq.*

Even if principles of *res judicata* or estoppel were not applied, exhaustion of remedies would not be required under the circumstances pertaining, for three reasons:

First, the FPC cannot provide an adequate remedy. LP&L seeks injunctive relief and then damages. FPC has no power to grant injunctive relief and no power to

award damages. 15 U.S.C. §717s; *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 69 S.Ct. 1251 (1949). This Court has recognized the inadequacy of remedy as a sound basis for not requiring pursuit or exhaustion of administrative remedies. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946); *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 65 S.Ct. 1120 (1945); *McNeese v. Board of Education*, 373 U.S. 668, 83 S.C. 1433 (1963).

Second, the FPC has exceeded its statutory powers. Basic to the exhaustion doctrine is that no pursuit or exhaustion is necessary where the administrative agency is acting in excess of its statutory powers. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, at 562, 39 S.Ct. 375 (1919):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

To the same effect, *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958), which appears to have accepted the criticism of *Myers v. Bethlehem Shipbuilding Corp.*, supra, found in *3 Davis §20.02*, pp. 58-59.

FPC clearly exceeded its statutory powers when it issued Order No. 431 (Pennzoil-United Ex. 13) arrogating to itself jurisdiction in the Curtailment Proceeding over contracts and persons which FPC admitted by its own expression ("non-jurisdictional") were beyond its

powers. FPC further exceeded its powers by permitting and authorizing United to implement its curtailment program with respect to the Green System even though FPC had not at that time reached any decision, no matter how lacking in merit, that it had jurisdiction of that facility.

Third and finally, there is no requirement to exhaust remedies when the certainty of an adverse decision makes exhaustion a futility. FPC issued Order No. 431, assuming jurisdiction of "*non*-jurisdictional" contracts; permitted United to curtail customers on the Green System even though no decision had been reached as to its jurisdictional status; and took the position in this suit that it has exclusive jurisdiction of the two contracts LP&L alleges were breached. (A.114) Under those circumstances it would have been futile to pursue the administrative remedy further. Where such futility exists, this Court has approved an abandonment of administrative remedies in favor of court action. *City Bank Farmers' Trust Co. v. Schnader,* 291 U.S. 24, 54 S.Ct. 259 (1934).

V. CONCLUSION

The judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

ANDREW P. CARTER
1424 Whitney Building
New Orleans, Louisiana 70130
COUNSEL FOR LOUISIANA
POWER & LIGHT COMPANY

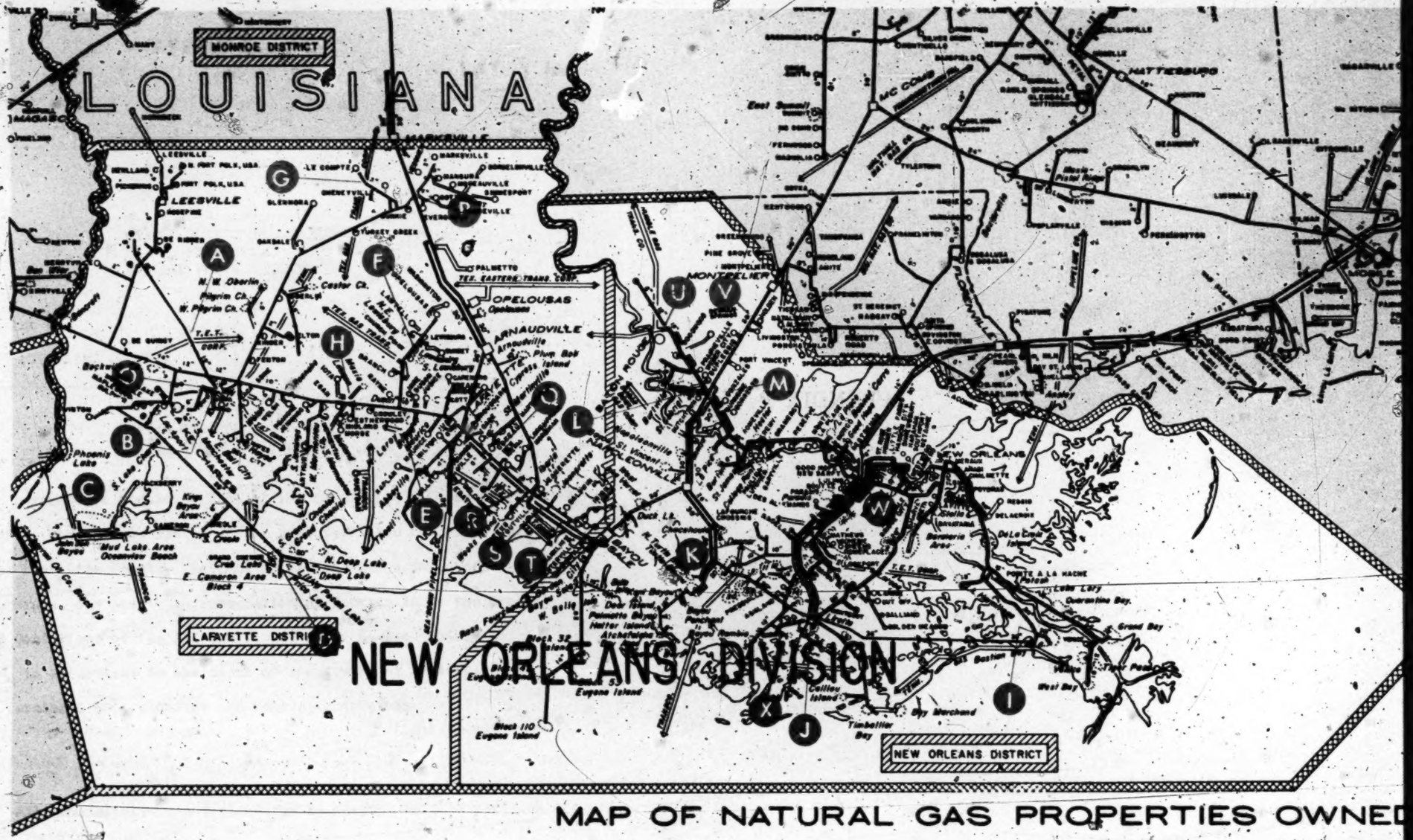
OF COUNSEL:

THOMAS W. LEIGH
THEUS, GRISHAM, DAVIS & LEIGH
400 South Grand Street
Monroe, Louisiana 71201

DAVID E. WALKER
MONROE & LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130

April 12, 1972

APPENDIX P



MAP OF NATURAL GAS PROPERTIES OWNED

BY

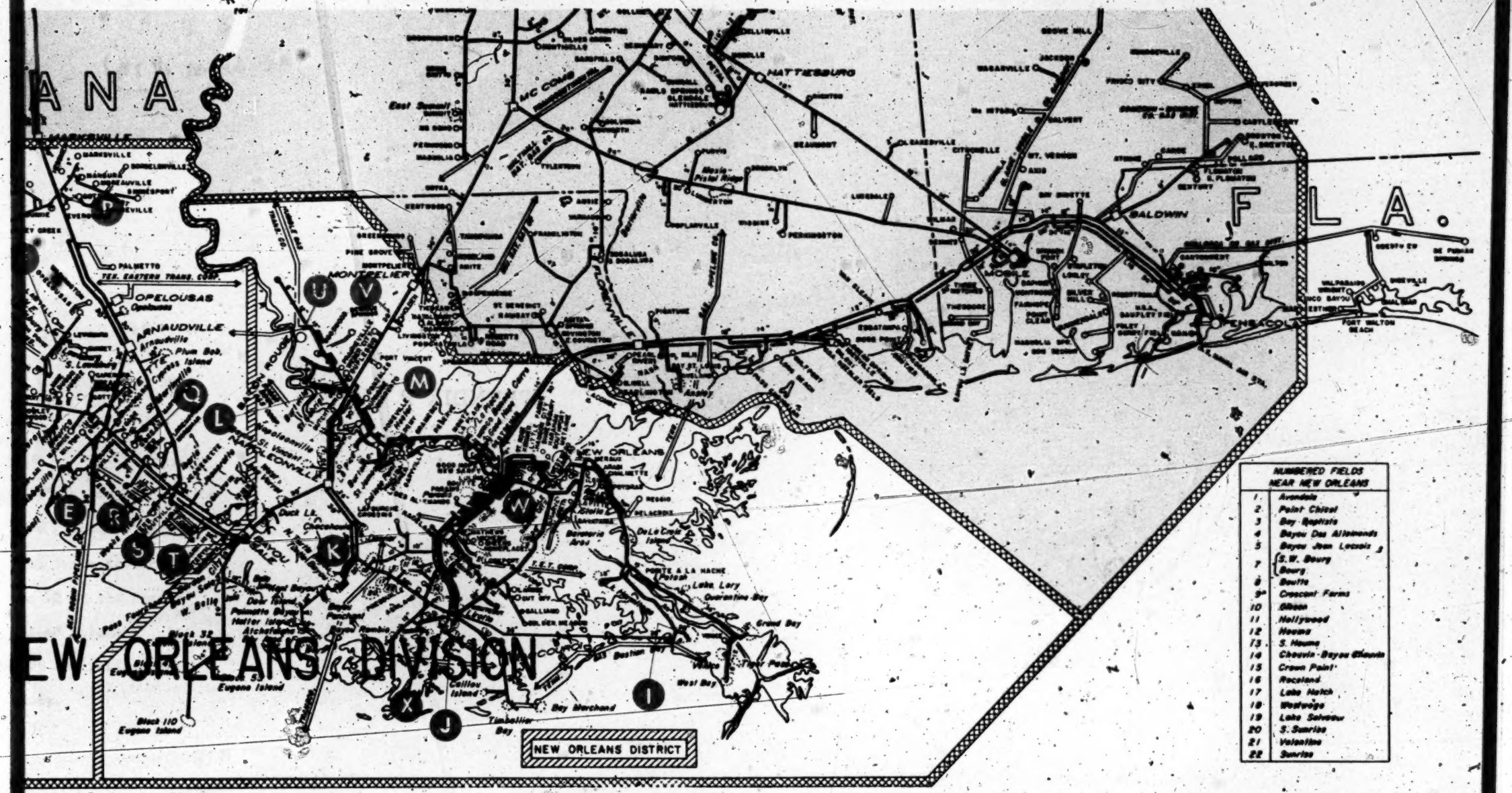
UNITED GAS PIPE LINE C

SHOWING

JURISDICTIONAL STATUS

LEGEND

APPENDIX P



MAP OF NATURAL GAS PROPERTIES OWNED AND OPERATED

BY

UNITED GAS PIPE LINE COMPANY

SHOWING

JURISDICTIONAL STATUS

LEGEND

APPENDIX Q

(41) 10-26-70

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of)
)
UNITED GAS PIPE LINE COMPANY) Docket No. RP 71-29

PETITION OF UNITED GAS PIPE LINE COMPANY FOR DECLARATORY ORDER

Pursuant to Section 1.7(c) of the Commission's Rules of Practice and Procedure and Section 554(c) of the Administrative Procedure Act, United Gas Pipe Line Company (United) hereby petitions for a declaratory order concerning the proper implementation of Section 12 of the General Terms and Conditions of its FPC Gas Tariff First Revised Volume No. 1, pertaining to priorities in the event of impairment of deliveries, in order to terminate controversies and remove uncertainty.

I.

All communications and pleadings in respect to this petition are to be sent to each of the following:

John C. Nelson
Executive Vice President
United Gas Pipe Line Company
1500 Southwest Tower
Houston, Texas 77002

William B. Cassin
Vice President and General Attorney
United Gas Pipe Line Company
1500 Southwest Tower
Houston, Texas 77002

J. R. Angell
Vice President
United Gas Pipe Line Company
Suite 704
1101 Seventeenth Street, N.W.
Washington, D. C. 20036

J. D. McCarty
Director of Rates and Regulatory Affairs
United Gas Pipe Line Company
Post Office Box 1407
Shreveport, Louisiana 71102

II.

By Commission Opinion No. 277 issued November 2, 1954,[1/] the Commission issued its order in Docket No. G-1508 directing the filing of United's FPC Gas Tariff First Revised Volume No. 1. Included in the tariff as accepted and filed is Section 12 of the General Terms and Conditions relating to impairment of deliveries which is excerpted in Appendix A hereto. It now appears that during the 1970-71 winter season United will be obliged to curtail deliveries because of the national gas shortage and this curtailment will require implementation of Section 12 of its tariff on a broad scale for extended periods of time. Commencing last summer, United informed its customers of the possibility of this curtailment; and in recent weeks United has informed each customer of United's specific plan to implement curtailments, based on the best information currently available, including specific projected curtailment volumes for the individual customers for the first three months of the winter season.

1/ United Gas Pipe Line Company, 13 FPC 398 (1954).

Most of United's customers have been very understanding and cooperative, recognizing that the current shortage is national in scope and arises from causes over which United has had no control, and also recognizing that United's proposed curtailment program is not only the most equitable program under the circumstances, but also the program which United is obliged to implement under the cited tariff provision and like provisions contained in all of United's direct sale contracts. However, certain of United's customers have expressed strong objections to United's plan of curtailment. United believes that these objections are utterly without merit, but the possible gravity of the consequence of leaving these disputes unresolved has forced United to request that the Commission declare the curtailment plan described herein to be in keeping with the provisions of its filed tariff.

III.

The possibility of curtailment arises not from a shortage of pipeline capacity, but rather from a temporary shortage of field gas supplies. Until recently United had reason to believe that it might not be necessary to curtail deliveries during the coming winter season, since it appeared that United might be able to make spot purchases of gas temporarily available to the interstate market. This gas is presently committed to the intrastate market. It now appears, however, that gas in volumes sufficient to obviate the need for curtailment will not be available at this time on a spot purchase basis and the curtailment program must therefore be made effective on November 1, the first day of the winter season. In any event, such spot purchases, if available at all, could not be made until this Commission completes

the proceeding recently initiated in Docket No. R-404 and an early completion of that proceeding is not presently in prospect.

United must emphasize that the curtailments contemplated by the plan described herein are made necessary by the almost universally recognized national gas shortage. United's position is not unique since almost all interstate pipeline companies have found their supply situation tightening in the recent past as producers have had less and less new gas to commit to the interstate market, while the demand for gas has risen at an unexpectedly rapid and accelerating rate. United is aware of the vigorous actions the Commission has recently taken and has under way at the present time to alleviate this critical gas shortage and United joins in the hope and anticipation that these actions will quickly bear fruit. In the interim, however, it is necessary to administer the curtailment program embodied in United's tariff and direct sales contracts in order that the ill effects of the current shortage may be dealt with expeditiously, equitably and lawfully.

IV.

The curtailment program embodied in United's tariff and direct sales contracts establishes three basic categories of gas use: (1) gas used for industrial purposes, including gas used to generate electricity which in turn is applied to industrial uses, (2) gas used to generate electricity which is consumed by domestic consumers, and (3) gas used by domestic consumers. In the event of a shortage, the program requires that all uses in category (1) be curtailed first and on a ratable basis. If there is still a shortage after total curtailment of category (1) uses, then category (2) uses are to be curtailed ratably. Only if the shortage

persists after total curtailment of categories (1) and (2) will uses in category (3) be subject to ratable curtailment.

Unless United is prevented from applying its curtailment program in the manner contemplated by its tariff and contracts, it will not be necessary during the coming winter to apply ratable curtailments to uses in categories (2) and (3). Thus only industrial uses will be affected, and these only to the limited extent hereinafter indicated.

It should be emphasized that United's tariff and contract provisions governing curtailment expressly provide that the ultimate use of the gas, or energy generated therewith, is the sole criterion controlling priority of service in the event of a shortage. The fact that some of the gas sold by United passes through one or more middlemen, including middlemen who may convert it to a different energy form, is of no significance in applying these curtailment provisions. Consequently gas sold directly to industries by United, gas sold to industries by pipeline customers of United, gas sold to industries by city gate customers of United and United's pipeline customers, and gas sold by United, its customers and its customers' customers to power companies for the generation of electricity for industrial use is to be curtailed on the same basis.

It should also be emphasized that the end use criterion which controls under the cited tariff and contract provisions is an objective standard that does not require extended consideration of comparative hardships and other value judgements inherent in allocation proceedings. Thus, if the facts available to United are correct concerning the end

use of the gas it sells, then the propriety and lawfulness of the curtailment program set out herein are established as a matter of necessity.

V.

In order to implement this curtailment program, United has had to determine what portion of the gas sold to each of its customers is used for industrial purposes. In making this determination, United has utilized a variety of sources of pertinent information. United's own industrial deliveries were obtained from its own records. The industrial deliveries of United's city gate customers were obtained from such customers. The direct and indirect industrial deliveries of United's pipeline customers were obtained from the statistics pertaining to United's pipeline customers and their customers as reported in Brown's Directory of North American Gas Companies (84th ed. 1970). The figures pertaining to the use of gas by United's direct and indirect power company customers for the generation of electricity consumed by industry were obtained from the 1969 annual reports to stockholders of the power companies involved. The resulting curtailable industrial volumes for each of United's customers are shown in the first column of Appendix B attached hereto.

Also shown on Appendix B are the volumes to be curtailed for each customer, with curtailment volumes being related to various projected system shortages which have been graduated in increments of fifty thousand Mcf per day. The increment of curtailment for each customer is subtracted from the customer's total requirements and the resulting daily volume permitted to be taken by each customer at each level of curtailment is set

forth on Appendix B.

As stated above, each of United's customers has been fully advised of the nature of the shortage and United's plan for handling the necessary curtailments. Each customer has also been furnished the specific projected curtailment volumes applicable to it for the first three months of the winter season based on (a) the information reflected in Appendix B and (b) the specific system shortage volumes which United has projected in the manner described hereinafter. The customers have assisted United in refining the data upon which Exhibit B is based and United is not aware of any disagreement concerning such data.

VI.

The final step in planning United's curtailment program for the '70-'71 winter months has been to project the system shortages during such months. The projected shortages are graphically illustrated in Appendix C.

As reflected in Appendix C, United has projected (a) its total system requirements and (b) its total system gas supply during the '70-'71 winter months. The projected supply has two components: (i) field gas supplies, and (ii) storage gas. The volume of storage gas available each day has been computed by establishing a withdrawal curve, which is shown on Exhibit D, with the amount of storage gas available on a given day being the gas in storage on such day in excess of the volume shown on the curve for such day.

United intends to maintain constant surveillance over the requirement and supply variables that determine actual curtailment

volumes as the winter progresses. The projections shown on Exhibit C will be updated on a continuing basis so that curtailments can be held to an absolute minimum. United's customers will be kept constantly advised of the resulting projection revisions and curtailment changes.

For informational purposes, United has extended the period covered by Exhibit C to show United's current projections through October of 1971.

VII.

United is vigorously pursuing its gas acquisition program in an effort to obviate the need for curtailments. This program encompasses efforts not only to obtain long term commitments of substantial reserves to the interstate market, but also to obtain spot gas, as previously discussed, and to obtain more gas from existing supplies by encouraging development and reworking on the part of existing suppliers. These efforts will not be relaxed until this critical problem is solved.

In addition, United for some time has followed the policy of refusing sales to all potential new customers and refusing to sell new volumes of gas to or through existing customers for industrial uses. This policy will remain in force until the current shortage has been cured.

VIII.

The orderly implementation of United's curtailment program obviously requires the cooperation, voluntary or otherwise, of United's

direct industrial customers. Some of those customers have indicated that they do not intend to cooperate with United's program, stating that they do not believe that they are required to do so under their contracts with United. Copies of all of such contracts have been filed with the Commission at the times United has applied to the Commission for authorization to construct the facilities required to make sales to United's direct industrial customers, in accordance with the provisions of Part 157 of the Commission's Rules and Regulations Under the Natural Gas Act. Copies of these contracts are also filed with the Commission for informational purposes under the provisions of Part 155 of the Commission's Rules and Regulations. These filed copies, and particularly the portions relating to curtailment, are by reference made a part hereof. United asks that the Commission's order requested by this petition also declare that the curtailment program set out herein is in accordance with the provisions of its contracts for the sale of gas in interstate commerce to direct sales customers from facilities which this Commission has authorized to be constructed under the provisions of the Natural Gas Act.

WHEREFORE, United respectfully requests the Commission to issue its order declaring that the curtailment program set forth herein is in accordance with the terms of United's tariff, and direct sales contracts.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

By _____

J. R. Angell
Vice President

DISTRICT OF COLUMBIA

J. R. ANGELL, being first duly sworn, deposes and says that he is Vice President for the named petitioner; that as such he has signed the foregoing for and on behalf of such petitioner; that he is authorized to do so; that he has read the same and is familiar with the contents thereof; and, that the matters and things set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ J. R. Angell
J. R. Angell
Vice President

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 26th day of October, 1970.

/s/ Lida K. Terrill
Notary Public

My commission expires September 14, 1971.

UNITED GAS PIPE LINE COMPANY
FPC Gas Tariff
First Revised Volume No. 1
Original Sheet No. 71

GENERAL TERMS AND CONDITIONS
(Continued)

(EXCERPT FROM UNITED GAS PIPE LINE COMPANY'S TARIFF)

12. IMPAIRMENT OF DELIVERIES

12.1 Proration of Impaired Deliveries - Seller delivers gas to (a) gas utilities, and pipe line companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power

GENERAL TERMS AND CONDITIONS
(Continued)

12. IMPAIRMENT OF DELIVERIES (Continued)

12.1 Proration of Impaired Deliveries (Continued)

plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full requirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller directly or indirectly.

convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4636 Filed 3-31-72;8:50 am]

[Docket No. CP72-176]

MICHIGAN WISCONSIN PIPE LINE CO.

Further Notice of Application

MARCH 20, 1972.

Take notice that on January 7, 1972, Michigan Wisconsin Pipe Line Co. (applicant), 1 Woodward Avenue, Detroit, MI 48226, filed in Docket No. CP72-176 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of facilities to increase the capacity of its interstate natural gas pipeline system and to render service under new provisions of its FPC Gas Tariff, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The proposed facilities have heretofore been described in the notice in the instant docket issued January 21, 1972, and published in the FEDERAL REGISTER on January 27, 1972 (37 F.R. 1989).

Applicant proposes to allocate an additional annual gas supply among its ACQ and MDQ customers in the ratio of their respective current annual gas purchase entitlements pursuant to a proposed new tariff provision included as an exhibit to the subject certificate application. In addition, applicant proposes to modify its tariff to provide present SGS customers an option to purchase gas under applicant's new ACQ-S rate schedule. Applicant states that the increase in the annual requirements of its SGS customers is not significant and will be met in full within the limits of their maximum daily quantities.

Any person desiring to be heard or to make any protest with reference to said application should on or before April 7, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules. Persons who have heretofore filed petitions to intervene need not file again.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4635 Filed 3-31-72;8:50 am]

[Docket No. CP72-176]

E. RALPH DANIEL ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 13, 1972, E. Ralph Daniel (Operator), et al. (Applicant), 2100 Chamber of Commerce Building, Houston, Tex. 77002, filed in Docket No. CP72-176 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to Transcontinental Gas Pipe Line Corp. (Transco) from the Johnson Bayou Field, Cameron Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that he commenced the sale of natural gas to Transco on February 17, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that he proposes to continue said sale for 1 year from the end of the 90-day emergency period within the contemplation of § 2.70 of the Commission's General Policy and Interpretations (18 CFR 2.70). Applicant proposes to sell approximately 43,800 Mcf of gas per month at 35 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4641 Filed 3-31-72;8:50 am]

[Docket No. CP72-177]

CHAS. T. McCORD, JR., ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 14, 1972, Chas. T. McCord, Jr., and Henry Goodrich, doing business as McCord-Goodrich Oil Co. (applicant), 1900 Rock Building, Shreveport, La. 71101, filed in Docket No. CP72-177 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to United Gas Pipe Line Co. (United) from the Bourg Field, Terrebonne Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicant states that it commenced the sale of natural gas to United on March 8, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that it proposes to continue said sale for one year from the end of the 90-day emergency period within the contemplation of § 2.70 of the Commission's general policy and interpretations (18 CFR 2.70). Applicant proposes to sell approximately 60,000 Mcf of gas per month at 35 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7

and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4468 Filed 3-21-72;8:50 am]

[Docket No. CI72-569]

ROBERT MOSBACHER ET AL.

Notice of Application

MARCH 20, 1972.

Take notice that on March 10, 1972, Robert Mosbacher et al. (Applicants), 21st Floor, Capitol National Bank Building, Houston, Tex. 77002, filed in Docket No. CI72-569 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce to Transcontinental Gas Pipe Line Corp. (Transco) from the East Perkins Field, Claiborne Parish, La., all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Applicants state that they commenced the sale of natural gas to Transco on March 6, 1972, within the contemplation of § 157.29 of the regulations under the Natural Gas Act (18 CFR 157.29) and that they propose to continue said sale for 1 year from the end of the 60-day emergency period within the contemplation of § 2.70 of the Commission's general policy and interpretations (18 CFR 2.70). Applicants propose to sell up to 5,000 Mcf of gas per day at 39 cents per Mcf at 15.025 p.s.i.a.

It appears reasonable and consistent with the public interest in this case to prescribe a period shorter than 15 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should, on or before March 31, 1972, file with the Federal Power Commission, Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's rules of practice and procedure (18 CFR 1.8 or 1.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by sections 7 and 15 of the Natural Gas Act and the Commission's rules of practice and procedure, a hearing will be held without further notice before the Commission on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or be represented at the hearing.

KENNETH F. PLUMB,
Secretary.

[FR Doc.72-4469 Filed 3-21-72;8:50 am]

SECURITIES AND EXCHANGE COMMISSION

[70-5160; 69-184]

AMERICAN ELECTRIC POWER CO., INC.

Notice of Proposed Amendment of Certificate of Incorporation To Increase Authorized Shares of Common Stock and Order Authorizing Solicitation of Proxies in Connection Therewith

MARCH 16, 1972.

Notice is hereby given that American Electric Power Company, Inc. (AEP), 2 Broadway, New York, NY 10004, a registered holding company, has filed a declaration with this Commission pursuant to the Public Utility Holding Company Act of 1935 (Act), designating sections 6(a)(2), 7, and 12(e) of the Act and Rule 62 promulgated thereunder as applicable to the following proposed transactions. All interested persons are referred to the declaration, which is summarized below, for a complete statement of the proposed transactions.

AEP proposes to submit to its stockholders at an annual meeting to be held April 26, 1972, a proposal to amend its Certificate of Incorporation to increase from 70 million to 90 million the aggregate number of authorized shares of common stock, par value $6.50 per share. It is contemplated that the additional shares of authorized stock, the issuance and sale of which are to be the subject of future filings with this Commission, will be used (a) to retire AEP's notes to banks and commercial paper notes, heretofore authorized, (b) for equity investments in its operating subsidiary companies, and (c) to permit the acquisition of operating properties or securities of one or more public utility companies. The proposed amendment will require the affirmative vote of the holders of the majority of the 58,800,000 outstanding shares of common stock. AEP intends to solicit proxies, which are to be mailed on or about March 28, 1972, the date of record for voting eligibility, from its common stockholders to obtain the requisite approval of the proposed amendment. AEP proposes to make telephonic, telegraphic, or personal solicitation to some stockholders through its officers and regular employees.

A statement of fees and expenses of AEP to be paid in connection with the proposed amendment will be filed by amendment. It is stated that no State commission and no Federal commission, other than this Commission, has jurisdiction over the proposed transactions. AEP has filed its proxy solicitation material and requests and the effectiveness of its declaration with respect to the solicitation be accelerated as provided in Rule 62.

Notice is further given that any interested person may, not later than April 14, 1972, request in writing that a hearing be held on such matter, stating the nature of his interest, the reasons for such request, and the issues of fact or law raised by said declaration which he desires to controvert; or he may request that he be notified if the Commission should order a hearing thereon. Any such request should be addressed: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request should be served personally or by mail (airmail if the person being served is located more than 500 miles from the point of mailing) upon the declarant at the above-stated address, and proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. At any time after said date, the declaration, as filed or as it may be amended, may be permitted to become effective as provided in Rule 23 of the general rules and regulations promulgated under the Act, or the Commission may grant exemption from such rules as provided in Rules 20 (a) and 100 thereof or take such other action as it may deem appropriate. Persons who request a hearing or advice as to whether a hearing is ordered, will receive notice of further developments in this matter, including the date of the hearing (if ordered) and any postponements thereof.

It appearing the declaration regarding the proposed solicitation of proxies should be permitted to become effective forthwith pursuant to Rule 62;

It is ordered, That the declaration regarding the proposed solicitation of proxies be, and hereby is, permitted to become effective forthwith pursuant to Rule 62, and subject to the terms and conditions prescribed in Rule 24 under the Act.

making an important contribution in reducing the delays and manpower required to coordinate work on the underground gas distribution system resulting from the long-term sanitary sewer construction program now in progress in both Nassau and Suffolk Counties. This public works program, coupled with new regulatory requirements for gas facility inspection programs, has greatly increased the work load for our personnel.

These developments are successfully holding down cost growth and keeping manpower requirements to a minimum. Despite these improvements in new construction, the cost of converting most or all of our existing overhead lines to underground would be tremendous, running well in excess of a billion dollars, and the costs to each individual customer would be substantial.

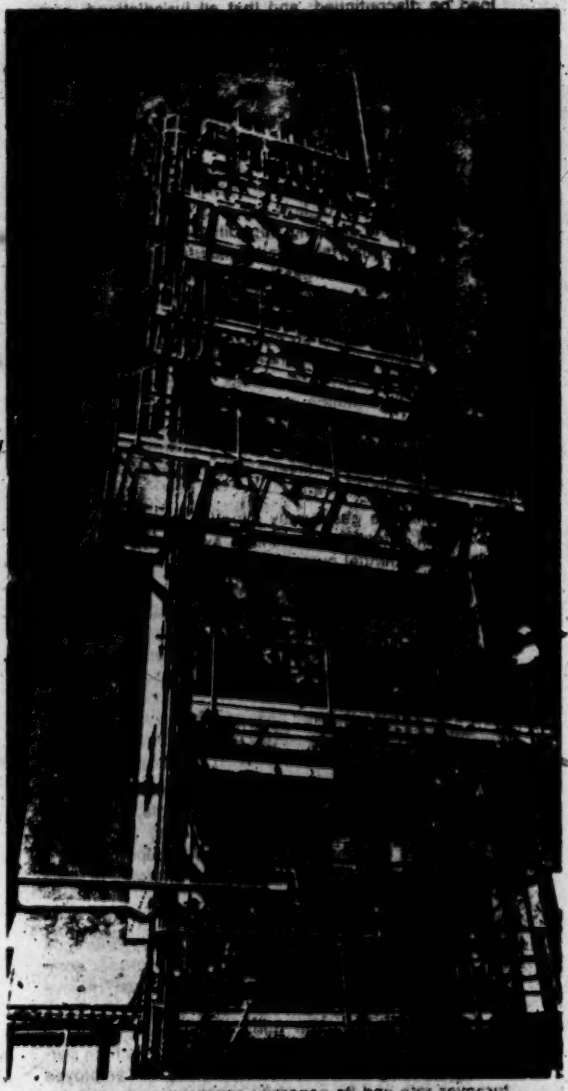
It must be recognized that where undergrounding has been achieved other problems present themselves. Underground cable fault location and repair takes considerably more time than equivalent overhead repairs. LILCO now has a mobile "RUD Van" containing special equipment and devices which can locate underground faults and temporarily restore service to the affected customers while permanent repairs are made. The time required to restore service to customers has thus been significantly reduced on many occasions.

Gas Supply

The volume of natural gas being shipped to Long Island by our pipeline suppliers has been curtailed recently because of the lack of development of new gas fields by gas producers. The producers claim that there has been insufficient financial incentive to develop additional supplies to match the growing nationwide demand because prices have been kept low under regulation.

This gas supply problem is not peculiar to Long Island. It is being experienced throughout New York State, in most eastern seaboard cities, and by other cities across the United States. The development of new gas supplies is being intensively pursued but it will be some time before firm plans for additional volumes of gas can be announced.

Keenly aware of these facts, the Public Service Commission, in a decision applicable to all gas companies in New York State dated October 26, 1971, concluded that: it is imperative that certain restrictions be imposed without delay on the attachment of new customers and on increased sales to existing customers; that an order of priorities be established in the event service must be curtailed; that pending a substantial improvement in the supply situation, sales promotion activities for the purpose of attracting new or additional



After gas goes through this cold tower it is stored as a liquid in one six-hundredth of its original space . . . for later use. The equivalent of 600 million cubic feet of gas can be stored in this facility. In this way, LILCO plans to meet, in part, the growing demand for energy on Long Island.

load be discontinued; and that all jurisdictional companies rendering gas service submit detailed plans, within 60 days, for new or additional peak shaving facilities or advise the Commission why such equipment is not proposed to be installed.

LILCO has devised such plans in keeping with a well conceived order of priorities to minimize the impact on its customers. The Company has contracts for the delivery from its pipeline suppliers of 174.1 million cubic feet per day of firm gas and 130.5 million cubic feet per day for peaking capability during the heating season. It also has facilities to manufacture 80.0 million cubic feet per day of gas for peaking requirements. In addition, LILCO's liquefied natural gas facility at Holbrook, which began operation in 1971, will hold the equivalent of 600 million cubic feet of gas and will be used to supply up to 100 million cubic feet per day at peak times. Thus, the total peak capability of the gas system is 484.6 million cubic feet per day, well in excess of the experienced peak demand. Despite the curtailments previously mentioned, the Company has every confidence that it will meet all the demands for gas by its firm gas customers.

Neither the gas supply situation nor the Commission order affect the continued availability of gas for existing residential customers.

Not In My Backyard

Everyone wants power but few want the power station in their neighborhood.

The question of siting received increased attention in 1971 both on a State and Federal level, but no resolution of the problem was reached.

LILCO supports the "one stop" approach to help bring order out of the present complications and discord in approving electric generating plant sites. While it has every expectation of receiving the necessary permits for its Shoreham Nuclear Station and for the fourth unit at Northport, it has an understandable ambition to see the present duplicative federal, state and local processes improved and streamlined in the interests of effectiveness and economy, energy and environment. Given the time lag from the conception to the building of power stations, it is clear not only to the Company, but to other observers, that present procedures, if they are not refined and improved, could result in even more serious implications for power production and reliability. The Company expects that the public solutions arrived at on all levels will reflect a proper balancing of both environmental and energy interests. Those decisions should come soon, perhaps in 1972.

PEOPLE

As a business operated by people, employees, for the benefit of two other groups of people, customers and investors, the primary responsibility of LILCO's management is to insure that all three groups of people are treated fairly, since satisfying the interests of each is essential to its success as a utility.

Investors have to realize a satisfactory return on their investment. Employees must receive proper compensation for their services. Customers must receive reliable service at reasonable rates. LILCO's success in satisfying these three publics is demonstrated, in part, by its earnings and dividend records, its high percentage of long term employees, its very low employee turnover rate and its generally appreciative customers.

LILCO's efforts, along with those of other regulated utilities, must also satisfy another very knowledgeable group of people, the experts employed by the regulatory bodies which have jurisdiction over the Company's operations. Thus, a utility like LILCO is a very people intensive, as well as a capital intensive, business.

If the interdependent interests of all these groups are to be effectively served according to a reasonable order of priorities, they, as well as the Company and the government, must work together toward some common objectives of efficiency and economy. This task has been complicated recently by two factors. One, an extremely small but very vocal section of the customer group has emerged, claiming to speak for the public at large, especially on environmental questions. Second, government groups are unintentionally complicating their efforts, sometimes complementary — and other times — competitive, to improve the environment in the face of the need for growing quantities of energy.

APPENDIX T

Natural Gas

The natural gas shortage throughout the nation is acute, but aggressive exploration and development activities promise some relief for Michigan in 1972, with more thereafter. Through its exploration subsidiary, the Company in 1971 participated in productive drilling in Michigan, Louisiana and the Gulf of Mexico. The Company also negotiated successfully for additional supplies from new discoveries in Michigan, and started building the nation's first synthetic natural gas plant.

The efforts of Consumers Power Company to overcome deficiencies in gas supply might well be described by the slogan of a well-known auto rental firm. The Company tried harder. And succeeded.

In addition to its wide-ranging exploration efforts, the Company contracted for long-term supply of liquid hydrocarbons from Alberta, Canada, and began construction of the nation's first plant to convert this liquid feedstock into synthetic natural gas.

These measures were made necessary by a critical shortage in the nation's available supplies of natural gas. So serious is the shortage that the Company's principal suppliers were forced in the spring of 1970 to give notice that they no longer could meet contractual deliveries. Thus, the Company found it necessary immediately thereafter to ask authorization of the Michigan Public Service Commission to restrict future sales of natural gas until more supplies became available.

In consequence, for the first 10 months of 1971 the Company limited the addition of new customers principally to residential users. No additional industrial or commercial customers were accepted, other than those to whom previous commitments had been made.

Meanwhile, however, the Company mounted intensive efforts to find more gas. Its wholly-owned subsidiary, Northern Michigan Exploration Company (NoMECo), undertook an aggressive program of exploratory drilling, both alone and in association with others. The results to date are encouraging.

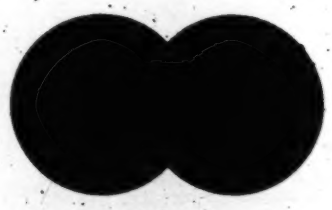
In the Kalkaska area of Michigan's lower peninsula, NoMECo has half ownership with Amoco Production Company in a gas well, and 100 percent ownership of two oil wells which also produce gas. New transmission lines were constructed in 1971 to bring gas to the Company's distribution system from these discoveries, as well as the discoveries of other producers. As a result, the Company expects to receive more than 10 million cubic feet of gas daily from northern Michigan, beginning in early 1972. In addition, another 10 million cubic feet daily is expected shortly from newly discovered fields in Ingham County; in southern Michigan, where the Company has contracted with the producer, Mobil Oil Corporation. By the autumn of 1972, the Company hopes to be receiving an estimated 70 million cubic feet daily from newly discovered Michigan fields.

In southern Louisiana, NoMECo is associated with Quintana Production Company in development of a substantial portion of the South Gibson gas field, which was discovered in 1970. The acreage under development has estimated reserves available to NoMECo of 260 billion cubic feet, and a potential of delivering up to 60 million cubic feet daily. NoMECo has entered into a contract with Trunkline Gas Company under which Trunkline agrees to transport gas from the South Gibson field to Michigan. This arrangement, however, is contingent on approval of the Federal Power Commission. Reference to intervention by several gas distributors, seeking to block this approval, will be found in the Legal Affairs Section.

In 1971, NoMECo participated with Quintana in drilling discovery wells in southern Louisiana, one in the North Freshwater Bayou Field, and another in the Cherokee Field. NoMECo and Quintana also are participating in one other exploratory project in southern Louisiana.

In offshore exploration in the Gulf of Mexico, NoMECo is associated with several other companies in a group headed by Sun Oil Company. During 1971, 14 exploratory wells were drilled to evaluate certain of the nine tracts under lease involving 45,000 undersea acres. Twelve of these wells, testing five tracts, reached their objectives; and six wells, on four tracts, were successful.

As a result of these discoveries, the group is contracting for an 18-well production platform, to be installed next autumn. Drilling of development



Consumers Power Company

wells is expected to begin in the autumn.

Meanwhile, another important step was taken in 1971 when the Company contracted for a $70 million gas reforming plant, to be built at Marysville, near Port Huron, Michigan, for production of gas by the catalytic rich gas process. Liquid feedstock from Canada—25,000 barrels daily the first year, and 40,000 to 50,000 barrels daily thereafter—will be delivered over a 15-year period starting in 1973. These liquid hydrocarbons will be stored in caverns formed in underground salt formations adjacent to the reforming plant. The facility is expected to begin delivering 100 million cubic feet per day of pipeline quality gas in 1973, equal to about 10 percent of the Company's present gas supplies. In 1974, completion of the plant will bring its output up to about 210 million cubic feet daily.

With prospect of additional gas from northern and southern Michigan, as well as from Louisiana, and the reforming plant under construction, the Company was able to return to the Michigan Public Service Commission in October, 1971, with a request to modify the restrictions of a year earlier. The Commission approved a flexible priority system which will permit the Company to maintain a balance between future gas supplies and demands of customers.

These modifications permit the Company to continue to provide gas service to all residential customers; to honor most of the 2,900 applications pending for service to commercial and industrial users; to permit most existing commercial and industrial customers to fully utilize existing gas equipment; and to accept new small commercial and industrial customers.

The Company continued active participation in the TARGET research program of the American Gas Association, exploring new energy concepts based on the fuel cell using natural gas to produce electricity. The original unit was developed for the Apollo Space Program. A field test power plant fuel cell is to be installed in mid-1972 in Flint, Michigan.

The Company ended 1971 serving 879,535 natural gas customers in 40 counties of Michigan's lower peninsula. These included 815,872 residential, 57,476 commercial, and 6,187 industrial customers. Among residential users, 734,481 heat their homes with natural gas.

An all-time record 24-hour sendout of natural gas was recorded February 2, 1971, when 2.241 billion cubic feet were delivered to the Company's customers. This, in turn, was exceeded in January, 1972 with a 24-hour peak sendout of 2.283 billion cubic feet.

In total, 333.9 billion cubic feet of gas were consumed during the year, an increase of 7.6 percent over 1970. Gas revenues were $286,091,000 for the year, up 4.5 percent over 1970.

Legal Affairs

The problems of government regulation: Can the Palisades plant be operated? Can the Midland nuclear plant be built? Will adequate rate increases be approved? When will the pay board clarify wage and salary regulations? Day in, day out, the Company's legal activities illuminate the problems of the business, particularly the two most serious—getting plants into operation . . . and obtaining adequate rates.

Americans live in a highly competitive world. And they must have adequate supplies of energy at reasonable cost if they are to maintain the nation's viability in that competitive world. Yet regulatory agencies tend to ignore economics, and are reluctant to grant rate increases sufficient to allow the energy industries to attract the capital necessary for continued expansion. Moreover, unrealistic government procedures often delay the construction of urgently needed energy facilities, or result in questionable requirements that substantially increase their cost.

Consumers Power Company regards itself as an early and continuing leader among all utilities in protecting the environment. But it also believes that a better environment must be achieved realistically, with concern for a proper balance between environmental goals and the critical need for expanded energy resources.

For the Company, 1971 was a year in which delay and uncertainty prevailed. When the year had ended, the Palisades nuclear plant operating license issue summed it up.

The electric rate case and the gas rate case also pointed up the problems of uncertainty, as did the frustrating attempts to overcome the delays in obtaining authorization from the Atomic Energy Commission to start building a nuclear plant at Midland.

The complexity of the latter proceeding was further compounded by a group of municipalities and REA generating and transmission cooperatives. They petitioned to intervene on antitrust grounds, contending that, if the plant is to be built, they are entitled to buy a certain guaranteed portion of the plant or its output. Moreover, they seek more favorable interconnecting arrangements, and demand that power purchased from others be delivered to them over the Company's transmission lines.

The obvious purpose of this action is to gain discriminatory and unreasonable advantages. This the Company is resisting, contending that there

Sales

Emphasis on Selling Off-Peak Loads

DP&L's marketing program has been directed to achieve greater utilization of the Company's installed facilities and the development of the total economy of West Central Ohio.

During the year, sales efforts were directed to obtaining electric space and process heating, outdoor security and decorative lighting, gas air conditioning and interruptible gas process sales. As a result, a high proportion of the year's new business was off-peak and year-round use loads. Sales achieved during the year represent $12.9 million of additional revenues on an annual basis. This new business includes $8.6 million estimated annual electric revenue and $4.3 million estimated annual gas revenue.

Electric Sales

Electric revenues for the year were $133 million, up 9.6% from 1970. Revenues from residential customers increased by 10.2% with 8,629 new customers being served. The Company's residential customers now use an average of 7,505 kilowatt hours per year, an increase of 313 kilowatt hours per customer over 1970.

The Company now serves over 18,400 electrically heated living units. Over 3,300 additional electrically heated residences were served during the year, an increase of 23%, including 676 existing homes which converted from other fuels.

Commercial electric revenues rose by 9.8% over 1970 with 464 additional customers served in 1971.

Electric heating was installed in 87 commercial buildings. The largest was the new 235,000 sq. ft. structure housing the Air Force Museum, near Dayton. This is Ohio's largest tourist attraction serving over a million visitors each year.

The kilowatt hour sales to industries increased 3.1% over 1970. Such sales to industries in the last quarter of 1971 showed a 13.3% increase indicating an upturn in the economy which is expected to continue in 1972.

Gas Sales

Revenue from sales of natural gas in 1971 was $67.6 million, up $10.8 million, or 19% over 1970. Approximately $5.8 million of this revenue increase resulted from higher gas rate schedules placed in effect in November, 1970.

In 1971, 4,655 new residential customers received gas service. Commercial gas sales increased 2.4% and industrial sales were up 9.2% over the previous year. The increase in industrial sales is partly the result of added interruptible industrial loads. The Company now serves 2.6 billion cubic feet of this type load. Since these loads can be interrupted and will not be supplied on peak days, a further improvement in our gas system load factor is anticipated.

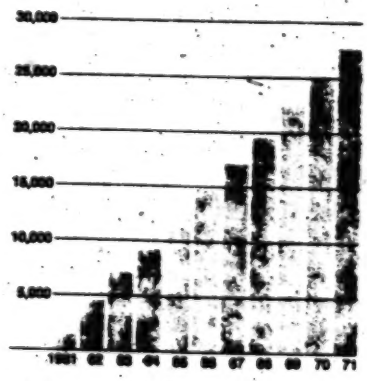
As a result of the critical natural gas supply situation, the Company operated under restricted gas sales policies during most of the year. Such restrictions were necessary to assure that the quantities of natural gas, available to the Company from its suppliers, are sufficient to meet the requirements of existing customers.

The Company's gas sales will continue to increase as additional users, whose service was committed by the Company prior to the sales restrictions, are connected and also as the requirements of existing customers increase. These increased requirements are within the Company's suppliers indicated available delivery volumes.

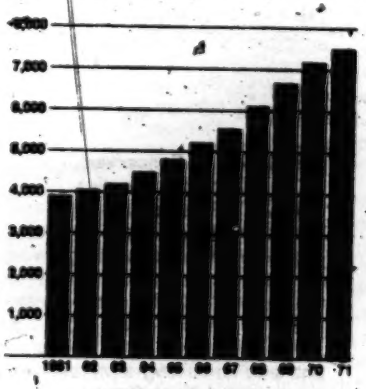
1971 Industrial Gas and Electric Revenue by Standard Industrial Classification

Electrical Machinery	19.2%
Transportation Equipment	16.7
Machinery, Except Electrical	13.7
Paper and Allied Products	7.5
Rubber and Miscellaneous Plastic Products	7.0
Primary Metal Industries	5.5
Printing and Publishing	5.3
Fabricated Metal Products	5.2
Stone, Clay, Glass, and Concrete	4.9
Food and Allied Products	4.3
Misc. and Other Classified Industries	5.0
Total Classified	94.5%
Non-Classified Manufacturing	5.5
Total Industrial Gas and Electric Revenue	100.0%

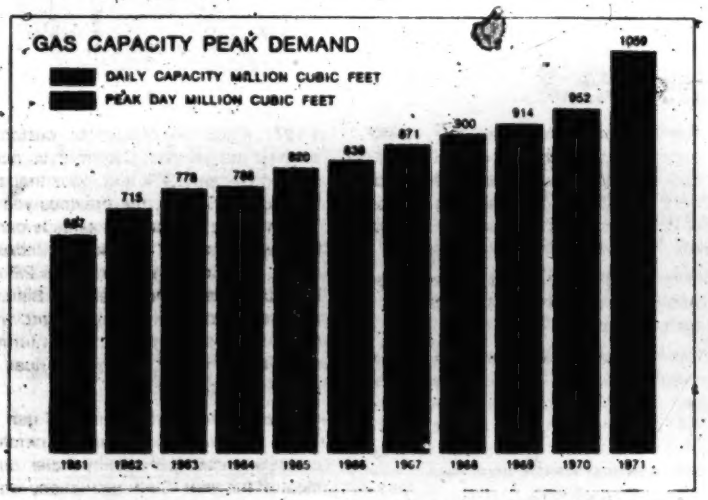
Highpoint Light Installations 1961 - 1971



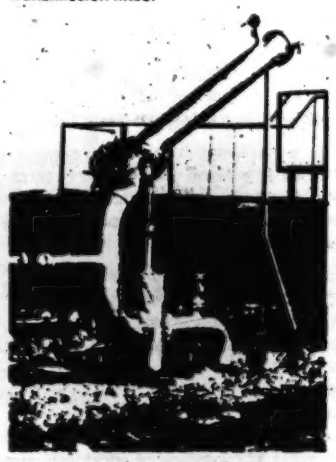
Average Residential Electric Consumption Per Customer 1961 - 1971



APPENDIX V



Efficiency of natural gas facilities is improved by mechanical equipment designed to remove liquids from transmission lines.



Natural Gas Availability Up 11.2 Percent

The Company also obtains gas from El Paso Natural Gas Co., local wellhead production, and Company-owned storage. These sources, plus the gas contracted for from CIG, make available to the Company a maximum of 1,059 million cubic feet of gas per day for the 1971-72 contract year. This is an increase of 11.2 percent over the 1970-71 consolidated peak day capacity volume of 952 million cubic feet.

The Company, therefore, does not anticipate any unusual problems in meeting normal requirements for natural gas in its service area during the 1971-72 contract year.

Gas Reserves Conserved

CIG's existing gas supplies, however, will not support the anticipated future gas requirements of its rapidly growing service area. Its management, therefore, decided to conserve its gas reserves by restricting its annual gas sales to 1972 levels until additional long-term reserves are available. Despite the annual supply restriction, CIG believes it will be able to meet increased firm peak day and annual requirements for the foreseeable future. To meet these requirements, CIG and its resale customers may need to impose a controlled restriction on annual sales to certain of their respective customers. The Company believes that it will continue to have a gas supply adequate to meet the growth of its firm market requirements.

PSCo, at the invitation of CIG, has joined an advisory committee charged with the responsibility of developing new terms and conditions of its tariffs that will implement this sales policy.

CIG is expending every effort to continue to improve its net reserve and deliverability position and plans to increase annual deliveries to its customers as acquisition of additional reserves permits.

New Supplies To Be Connected

CIG has received Federal Power Commission (FPC) permission to connect its pipeline system to a new supply of natural gas in the Big Horn Basin of Wyoming and Montana. This Big Horn supply, which will enter CIG's transmission system in the fall of 1972, will add 5,301 million cubic feet to CIG's annual supply in 1972, 15,655 million cubic feet in 1973, 15,559 million cubic feet in 1974, and 15,669 million cubic feet in 1975. In addition, CIG, on December 30, 1971, filed with the FPC an application to construct additional pipeline and storage facilities in Colorado, Oklahoma and Wyoming. These new facilities will increase CIG's daily transmission system capacity to 1,305 million cubic feet.

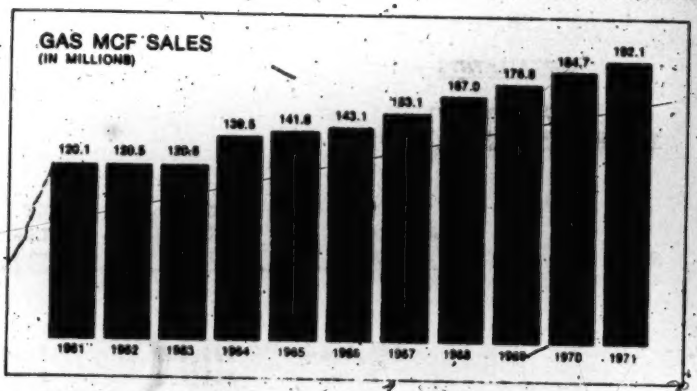
Increased Exploration Necessary

PSCo is cognizant of CIG's gas supply problems. The Company, however, views the current gas shortage as a temporary situation that can be alleviated by increased exploration. The Potential Gas Committee Report of 1971, indicating potential U.S. gas reserves of 1,178 trillion cubic feet, clearly shows that the current shortage is not due to depletion of the resource base.

The overwhelming evidence is that the shortage is due to the lack of financial incentive to undertake drilling ventures to discover and develop these potential reserves.

The FPC, as a result of its own investigation of price levels for natural gas produced in the Rocky Mountain area, issued an order in July, 1971, that establishes higher initial rates for new gas

PSCo's Leyden Gas Storage Project continues to provide peak requirements necessary in meeting the natural gas needs of our customers. Located in an abandoned coal mine 10 miles northwest of Denver, Leyden provided approximately 16 percent of the needs for the 1971 peak day.



supplies found in the area. These new higher rates should encourage additional gas exploration in the Rockies, a region from which a substantial portion of PSCo's gas is obtained.

Colorado Interstate Gas has advised the Company that its anticipated total gas reserve acquisition budget for 1972 will be approximately $11 million, which is three times the 1971 program. Also, PSCo is engaged in exploration and development of additional gas supplies through two of its wholly owned subsidiaries, Fuel Resources Development Co. (Fuelco) and Western Slope Gas Co. (WSG).

Western Slope Gas Acquires Reserves

WSG connected 12 wells to its gathering systems in 1971 in its continuing program to acquire reserves and expand its delivery capacity. WSG now has 186 wells connected to its gathering systems and anticipates connecting at least 16 more wells by mid-1972. At mid-year, WSG completed two purchase agreements that, ultimately, are expected to bring into its natural gas transmission system an average of over six million cubic feet of gas per day from the fast-growing Wattenburg Field north of Denver. Total reserves acquired by WSG during the year amounted to 20 billion cubic feet.

Fuelco Exploration Organized

In its initial year, Fuelco concentrated its exploratory operations in Colorado, Wyoming, and Utah, acquiring a leasehold of 307,160 gross acres in those three states. All four of Fuelco's drilling ventures in Western Colorado resulted in apparent gas producers. Fuelco also participated in ventures with other operators involving the drilling of 11 wells, of which two were successful.

Underground Storage Vital

The peak day deliverability protection and financial advantage afforded by PSCo's Leyden Gas Storage Project, located in an abandoned coal mine 10 miles northwest of Denver, was again demonstrated when this facility provided 155 million cubic feet of gas on the 1971 peak day. Additional Company-owned peak day deliverability was provided when the two-well Fruita Field in Western Colorado was converted to underground storage and connected to the Asbury Storage Complex.

Facilities Expanded

Continued rapid population growth in PSCo's service territory in 1971 with the resultant increase in the number of gas customers has required considerable expansion of the Company's gas distribution facilities.

A $1.3 million construction program completed in November at WSG's West Douglas compressor station increased deliverability of that facility to 30 million cubic feet of gas per day. Gas transmission line reinforcement projects were carried out during the year in the Climax, Rangely, Steamboat Springs and Front Range areas.

Technology Increases Efficiency

The utilization of modern technology and innovations increased efficiency and effected economies in several gas operations. The Company's Gas Control Equipment Department developed a "first-of-its-kind" fiberglas regulator station housing that can be erected in one day, compared to the three weeks required for conventional structures. The housing is designed to blend in with surrounding buildings.

Crew times on the Company's gas leak testing program were reduced by 66 percent with the use of a "Tractair," a self-propelled unit that drills holes for electronic gas-sniffing probes. Using computer equipment, WSG made computer models of its transmission facilities that will help analyze operations and plan future system modifications.

APPENDIX W

(FROM UNITED GAS PIPELINE COMPANY REPORT ENTITLED "GAS SUPPLY - REQUIREMENTS - REVISED - NOVEMBER 1, 1971, THROUGH MARCH 31, 1972" DATED DECEMBER 15, 1971)

CURTAILMENTS

NOVEMBER 1971
VOLUME IN MCF @ 14.73 PSIA

	MCF ALLOCATED VOLUME	MCF ACTUAL VOLUME	MCF UNDER (OVER)
INDUSTRIALS			
Air Products & Chemicals, Inc.	997,218	995,609	1,609
Allied Paper Company	249,007	241,492	7,515
Aluminum Company of America	482,047	438,540	43,507
American Cyanamid	192,626	187,098	5,528
American Metals Climax	97,611	101,957	(4,346)
Atlas Processing Company	166,812	151,361	15,451
Boise Southern Company	448,453	479,631	(31,178)
Cities Service Oil Company	2,788,080	2,827,129	(39,049)
Coastal Chemical Company	497,032	496,734	298
Colonial Pipeline Company	93,313	89,433	3,880
Container Corp. of America	243,506	238,890	4,616
Continental Can Company	370,146	364,149	5,997
Corchem, Inc.	102,069	43,221	58,848
Courtaulds North America Inc.	244,684	237,676	7,008
Georgia-Pacific Corporation	112,777	113,155	(378)
Ideal Cement Company	202,590	213,971	(11,381)
International Paper Company - Mobile	128,173	138,286	(10,113)
International Paper Company - Moss Point	371,939	366,892	5,047
International Paper Company - Springhill	722,466	754,154	(31,688)
International Paper Company - Vicksburg	224,782	215,415	9,367
Jefferson Lake Sulphur Company	157,751	157,761	(10)
Marquette Cement Company	102,713	82,171	20,542
Masonite Corporation	679,454	709,043	(29,589)
Monsanto (Chemstrand)	1,077,902	1,110,277	(32,375)
National Gypsum	103,998	103,193	805
Olinkraft, Inc.	601,387	607,915	(6,528)
St. Regis Paper Company - Monticello	328,394	315,321	13,073
St. Regis Paper Company - Pensacola	461,617	501,568	(39,951)
Scott Paper Company	596,811	560,021	36,790
Shell Oil Company	887,328	887,328	0
Southland Paper Mills, Inc.	520,270	526,056	(5,786)
Stauffer Chemical Company	215,197	215,545	(348)
Tenneco Chemical, Inc.	147,281	141,935	5,346
Texas Gulf Sulphur Company	168,728	205,110	(36,382)
TOTAL INDUSTRIALS FOR MONTH	14,784,162	14,818,037	(33,875)
AVERAGE MCF/DAY	492,805	493,935	(1,129)